CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

JANUARY TERM, 1875, AT JEFFERSON CITY.

JOHN GRAVES, Appellant, *vs.* JAMES T. MCHUGH, *et al.*, Respondents.

1. *Dram shop keepers—Selling to minors—Action on bond—Bond admissible in evidence without signature of sureties or approval of County Court.*—In suit on the bond of a dram shop keeper, for selling liquor to a minor, the bond is admissible in evidence even without the signatures of two sureties, or proof that it had been approved by the County Court.
2. *Dram shop keepers—Bond, action on—Jurisdiction—Justices' courts.*—Under the statute concerning Dram Shop Keepers, (Wagn. Stat., 552, § 20) an action by the parents of a minor, for the penalty of fifty dollars prescribed, may be brought, against the dram-shop keeper alone, before a justice of the peace; but a justice has no jurisdiction of a joint action against the dram-shop keeper and his sureties for a breach of the conditions of his bond, the amount of the bond being fifteen hundred dollars.

Appeal from Newton Circuit Court.

N. H. Dale, for Appellant.

E. L. Edwards & Son, with J. C. Cravens, for Respondents.

Hough, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace, on a bond executed by the defendant, McHugh, as principal, and his co-defendant, Hutchison, as surety, in the sum of fifteen hundred dollars, under the 6th section of the law in relation to dram shops, to recover the sum of fifty dollars for an alleged breach of its conditions, committed by McHugh, in selling and giving away intoxicating liquors to a minor son of the plaintiff, Graves.

Judgment was given for the defendants by the justice. An appeal was taken to the Probate and Common Pleas Court of Newton county, and on the trial in that court plaintiff offered in evidence a copy of the bond sued on, duly certified by the clerk of the County Court, which was rejected on the ground that it was not signed by two sureties, as required by law, and that it did not appear that it had ever been approved by the County Court. Thereupon plaintiff took a non-suit, with leave to move to set the same aside, and after the proper steps brings the case here by appeal.

The objections made to the introduction of the bond in evidence were not entitled to any consideration, and should have been disregarded. (James vs. State to use of Blow, 7 Mo., 81; *Id.*, 458; Henry vs. State to use of Russell, 9 Mo., 778; State vs. Thomas, 17 Mo., 503; James vs. Dixon, 21 Mo., 538; State to use of Young vs. Hasselmeyer, 34 Mo., 76.) But objection is made here that the justice had no jurisdiction, as under the statute in relation to suits on bonds, the judgment, if for the plaintiff, must be for the penalty of the bond. This objection, although not made in the court below is entitled to be heard here.

The statute under which this action is brought, is as follows: "Every dram shop keeper who shall sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors, in any quantity, to any minor, without the permission of the parent, master or guardian of such minor first had and obtained, shall forfeit and pay to such parent, master or guardian, for every such offense

fifty dollars, to be recovered by the party entitled to sue, by civil action in any court having competent jurisdiction against such dram shop keeper, or by suit in such court in the name of the county to the use of such person entitled to sue, on such bond, or a duly authenticated copy thereof, against such dram shop keeper and his sureties, jointly or severally; but every action brought under this section shall be commenced within one year from the time the right of action accrued, and not afterwards." (Wagn. Stat., 552, § 20.)

Two remedies are provided by this section; one against the dram shop keeper alone, which a justice of the peace has jurisdiction to enforce; the other against the dram shop keeper and the sureties on his bond, for a breach of the conditions of the bond, of which a justice has no jurisdiction.

The judgment must therefore be affirmed; the other judges concur, except Judge Vories, who is absent.

STATE OF MISSOURI, Defendant in Error, *vs.* WILLIAM I. LACK, Plaintiff in Error.

1. *Venue, change of—Attorneys are competent witnesses to prove facts necessary to sustain.*—Attorneys at law are competent witnesses to sustain allegations in support of an application for change of venue.

Error to Franklin Circuit Court.

J. W. Boulware, for Plaintiff in Error.

Attorney General, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

From the conviction in this case the defendant sued out his writ of error, and the judgment will have to be reversed on account of the ruling of the court in denying the application for a change of venue.

Upon proper notice being given to the prosecuting attorney, the defendant presented his petition for a change, assigning as a reason therefor, that the judge was prejudiced against him, so that he could not have a fair and impartial trial. This petition was verified by the affidavit of defendant, and in addition he offered to support it by the affidavits of two witnesses, who, it seems, were attorneys practicing in that court.

The court decided against the application, not on the ground that the testimony was insufficient or not satisfactory, but because it was not proved by legal and competent evidence. The statute, as it now exists, requires that the truth of the allegations in the application for a change shall be proved by legal and competent evidence, to the satisfaction of the court. (Sess. Acts 1873, p. 56; State vs. O'Rourke, 55 Mo., 440; State vs. Sayers, decided at this term.)

Whether the evidence is legal and competent does not depend upon its being satisfactory. The one relates to the means to establish the fact; the other has reference to the conclusion or judgment resulting therefrom. The court must be satisfied, but the party has the right to introduce any evidence to sustain his allegations, which is legally admissible according to the rules governing the admission of testimony. We are not aware of any principle prohibiting attorneys from giving evidence in cases like this. They are frequently the best witnesses that can be obtained, and have knowledge of facts which few others would be likely to have. At all events they cannot be excluded on the ground of incompetency. The court therefore erred in its ruling out the testimony offered by the defendant.

The question relating to a continuance and the impaneling of the jury need not be commented on, as the case must be re-tried. The same remark will apply to the instructions.

The judgment will be reversed and the cause remanded; the other judges concur, except Judge Vories, who is absent.

ROBERT STONEMAN, Respondent, *vs.* THE ATLANTIC & PACIFIC R. R. Co., Appellant.

1. *Railroads—Killing of stock—Negligence.*—Although failure of the persons in charge of a railroad train to ring a bell or blow a whistle when within eighty rods of a public crossing is negligence, yet, such negligence is not, by itself, sufficient to authorize a recovery for damages for an animal killed at such place, unless it is shown by sufficient testimony, that such killing was attributable to such negligence.

Appeal from Newton Circuit Court.

J. N. Litton, for Appellant, cited Great West. R. R. vs. Geddis, 33 Ills., 307; Skouten vs. Wood, 57 Mo., 380; Galena & Chicago R. R. vs. Loomis, 13 Ills., 548; 1 Redf. R. W., 478, § 128–9; Sh. & Redf. Neg., 564, § 485*a*; Steves vs. O. & S. R. R., 18 N. Y., 425; Pittsburg vs. Karris, 13 Ind., 89; C. & R. I. R. R. vs. McKim, 40 Ills., 229; Karle vs. K. C., St. J. & C. B. R. R., 55 Mo., 483; Toledo R. R. Co. vs. Foster, 43 Ills., 417.

J. C. Cravens, for Respondent, cited Wagn. Stat., 310, § 38; Rohback vs. Pac. R. R., 43 Mo., 187; Biglow vs. N. M. R. R. 48 Mo., 510; Tabor vs. Mo. Valley R. R., 46 Mo., 353; Gorman vs. Pac. R. R., 26 Mo., 441; Burton vs. N. M. R. R., 30 Mo., 372; Calvert vs. Hann. & St. Jo. R. R., 34 Mo., 242; Calvert vs. Hann. & St. Jo. R. R., 38 Mo., 467; Powell vs. Hann. & St. Jo. R. R., 35 Mo., 457; Brown vs. Hann. & St. Jo. R. R., 33 Mo., 309.

NAPTON, Judge, delivered the opinion of the court.

This action was brought under the 38th section of the corporation act (1 Wagn. Stat., p. 310) to recover the value of a horse killed by a locomotive of defendant at the crossing of a county road.

The only question presented here is as to the propriety of the instruction given by the court to the jury, which was as follows:

"The court instructs the jury, that if they believe from the evidence, that on the 13th day of September, 1873, the plain-

tiff's roan mare was struck by defendant's engine, while running one of its trains and killed, and that said mare, at the time of the killing, was on a public road which was crossed by defendant's track, and that defendant failed to ring or cause to be rung a bell, when at a distance of at least eighty rods from said crossing, and to continue to ring such bell until said engine and train had crossed such road; or if they believe that the defendant or its agents failed to sound a steam whistle attached to the engine, when at least eighty rods from such crossing, and continued to sound such whistle at intervals until the engine and train had crossed the said road, they will find for the plaintiff."

And the court refused to give the following instruction asked by defendant:

"The fact of the killing of the animal by defendant's engine at a public road crossing does not raise the presumption that the killing was the result of negligence on the part of the defendant's servants, unless the jury shall find that the failure to ring the bell or sound the whistle upon approaching such road crossing was the direct cause or occasion of such killing, and that the same would not have occurred if such whistle and bell had been sounded and rung."

The statute, which requires the ringing of bells or sounding of a steam whistle under specified circumstances, declares that the corporation shall be liable for all damages which shall be sustained by any person by reason of such neglect.

The instruction given was defective in not leaving to the jury to find whether the damages resulted from the negligence of the defendant in failing to ring the bell or sound the whistle. Of course, if the damage had no connection with the negligence, the defendant was not responsible, and the instruction asked by defendant should have been given, or the first instruction should have been modified and qualified so as to leave the question to the jury.

As a matter of law, the court correctly declared the failure to ring the bell or sound the whistle at the point designated was negligence, but whether that negligence occasioned the

damage complained of was a question of fact, upon which the jury had a right to pass. The court had no right to declare, as a matter of law, that the jury had nothing to find but the killing of the animal at a crossing of a public highway, and the failure of the company to have the bell rung or the whistle sounded. There may have been no connection, whatever, between the negligent omissions and the damage, and the very terms of the statute under which the suit is brought clearly indicate that the damage must be the result of the negligence. This was so held in Karle vs. K. C., St. Jo. & C. B. R. R., (55 Mo., 483,) in which it is said:

"The three instructions which declared a failure of the defendant to observe the regulations of the city ordinance in relation to the speed of trains, keeping head-lights and ringing the bell, to be negligence *per se*, were undoubtedly correct. These were violations of an express law, and of course amounted to negligence. It does not follow, however, nor was the jury so instructed, that these violations of law, or any one of them, made defendant liable; for in this, as in the other instructions, the qualification announced in the first and principal instruction on negligence, that this negligence caused the injury, was necessarily implied."

Nor does the case of Howenstein vs. The Pacific R. R. Co., decided at the same term and reported in the same volume, announce any different doctrine. The third instruction given in that case for defendant was this:

"If the court should find from the evidence, that the engineer in charge of the locomotive at the time the animals were killed did not ring the bell or sound the whistle within eighty rods, etc., then the court will find for defendant, unless the plaintiff shall prove that the damage sustained by him in the killing, etc., was occasioned by the failure of the engineer to ring the bell and sound the whistle.

It is said in the opinion, that the three first instructions given for defendant were rather more favorable to defendant than he was entitled to, but the subsequent comments on them show that the judge delivering the opinion had refer-

ence only to the first two instructions, and not to the third. The main question examined in that case was as to the evidence necessary to make a *prima facie* case, and we think the decision gives no countenance to the position that the railroad company was responsible for damages which did not result from their non-compliance with duties imposed by the statute.

The instruction in this case was clearly wrong. The question as to the proof necessary to show the connection between the negligence of failing to ring the bell and sound the whistle, and the loss sustained, is another matter, upon which the opinion of the court in Howenstein vs. Pac. R. R. Co., (55 Mo. 33), is in point.

Judgment reversed and remanded; the other judges concur except Judge Vories, who is absent.

STATE OF MISSOURI, Defendant in Error, *vs.* ZACHARIAH JONES, Plaintiff in Error.

1. Case dismissed for want of bill of exceptions signed by the judge of the trial court.

Error to Callaway County Circuit Court.

Jno. A. Hockaday, Attorney General, for Defendant in Error.

J. W. Boulware, for Plaintiff in Error.

WAGNER, Judge, delivered the opinion of the court.

In this case, the bill of exceptions is not signed by the judge presiding at the trial, and there is no record before us to review.

Let the writ be dismissed; the other judges concur except Judge Vories, who is absent.

STATE OF MISSOURI, Respondent, *vs.* MARTIN BREEDEN, Appellant.

1. *Practice, civil—Trials—Instructions, commenting on evidence improper.*—Instructions, which comment on the evidence or direct attention to the improbability of a particular part of it, are improper. The improbabilities or contradictions in the statements of witnesses are matters for the consideration of the jury.
2. *Witnesses—Impeachment—Moral character may be inquired into.*—In order to discredit a witness, the inquiry need not be confined to his veracity alone, but may properly be extended to his general moral character.
3. *Witnesses—Credibility—Conspiracy—Motives.*—The spirit, which animates a witness, is always a proper subject for inquiry, in order that the jury may place a proper estimate upon the value and importance of his testimony. And the formation of a conspiracy against a party, on the part of witnesses, may be properly shown on the examination.

Appeal from Jasper Circuit Court.

Brown, Walser & Bray, for Appellant.

Attorney General, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

The defendant was indicted under the provisions of Wagn. Stat., § 9, p. 500, for defiling his ward. The indictment contained words sufficiently descriptive of the offense, and charged that the act was feloniously done, and is therefore not open to the objections urged against it. The case of the State vs. Feaster, (25 Mo., 325) is not in point, but widely distinguishable from the present one; for there the act, which constituted the offense, was not charged to have been feloniously done, but only that the assault was feloniously made.

The instructions given by the court on its own motion presented the matter with great fairness to the jury, so that no room for complaint exists on this score, although instructions asked by the defendant were refused. And the court was clearly in the right in refusing any instruction, which was a mere commentary on a portion of the evidence, and sought to direct the special attention of the jury to the consideration of a particular part of the testimony of the prosecutrix, as evincive of the contradictory nature of her story respecting the entry in the family bible in reference to the date of her birth.

The improbabilities in the testimony of witnesses, or their contradictory statements, are matters for the consideration of the jury in making up their verdict. There was a tendency in the evidence to support the verdict, and what weight should be given to it, was to be determined alone by the triers of the fact; and we will not intrude upon their province in this regard.

But there was unquestionably error in the refusal to admit testimony as to the moral character of the prosecuting witness. The better opinion now is, that, in order to discredit a witness, the inquiry need not be confined to his veracity alone, but may be properly extended to his general moral character. (State vs. Shields, 13 Mo., 236; *Id.*, 422.) And there was also error in refusing defendant permission to adduce evidence to show that any witness or witnesses had formed a conspiracy against defendant, or had in any manner exhibited feelings of hostility against him. The spirit which animates a witness is always a proper subject for inquiry, in order that the jury may place a proper estimate upon the value and importance of his testimony.

For these errors in relation to the evidence, the judgment must be reversed and the cause remanded; Judge Vories absent; the other judges concur.

G. H. Conover, *et al.*, Appellants, *vs.* W. J. Berdine, Respondent.

1. Dismissed for want of a final judgment in the court below.

Appeal from Jackson Circuit Court.

J. E. Havens, for Appellants.

A. A. Tomlinson, for Respondent.

Sherwood, Judge, delivered the opinion of the court.

From aught that appears from the record, this cause is still pending in the trial court, as there is no final judgment. The appeal is therefore dismissed. Judge Vories absent; the other judges concur.

WILLIAM BYINGTON, Respondent, *vs.* A. C. HOGAN, *et al.*, Appellants.

1. Judgment affirmed on the pleadings.

Appeal from Vernon Circuit Court.

Waldo P. Johnson, for Appellants.

John T. Birdseye & Meigs Jackson, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Suit for foreclosure of mortgage. Any discussion as to the correctness of the ruling, which admitted in evidence the original answer of defendants, is entirely unnecessary, as the first and second amended answers contain in effect the same admission. The last answer contains the clause:

"These defendants deny that said mortgage was ever assigned to plaintiffs further than would accrue in equity from an assignment of said notes, if they were ever assigned, etc."

It is obvious, that this clause of the defendant's answer leaves the affirmative allegation of the petition, that the notes had been assigned to plaintiff, undenied.

Nor is the admission thus made at all affected or qualified by the subsequent averment of no knowledge or information sufficient to form a belief as to whether the assignment or indorsement was made on the notes by any one having authority. Other errors are assigned, but as they have not been mentioned in counsel's brief, they will remain unnoticed.

Judgment affirmed; Judge Vories absent; the other judges concur.

FRANCIS BOYER and JAMES CHARLEY, Jr., by their next friend M. W. McGEE, Respondents, *vs.* MICHAEL DIVELY, Adm'r *de bonis non*, with will annexed, of WILLIAM GILLIS, and BERNARD DONNELLY and F. M. BLACK, Ex'rs of the last will of MARY A. TROOST, Appellants.

1. *Practice, civil—Pleading—Wills, contests concerning—Petition, sufficiency of—Heirs not mentioned.*—A petition, which alleges that plaintiffs are the children of a decedent who left a will, in which no mention is made of them, and prays for distribution according to law, is sufficient. The authority of the Circuit Court to order distribution in such cases attaches before any distribution of the estate, and consequently it is not necessary to allege in the petition that the legacies have been paid and the estate distributed. (Levins vs. Stevens, 7 Mo., 90, affirmed.)
2. *Wills, contests concerning—Issues may be framed and submitted to the jury.*—Under our statute (Wagn. Stat., 1041, § 13) in contests concerning the construction or validity of wills, the court may frame issues and take the opinion of a jury upon any specific questions of fact involved, although such verdicts are not binding upon the court.
3. *Marriages with Indians, what sufficient.*—Under the customs of Indian tribes, when a messenger was sent by the intended bridegroom to the parents of the bride, with a proposal to take her as his wife according to the Indian custom, and with presents to the parents, and the parents had signified their acceptance, and the bride, with their consent, had returned and cohabited with the suitor, these facts would constitute a valid marriage.
4. *Marriages with Indians—Marriages according to Indian customs valid, although the tribe might reside in the State of Missouri—Constitution of the United States.*—The Constitution of the United States, and the statutes passed in pursuance thereof, recognize the Indians as a peculiar people, having relations to the Government totally different from citizens of the States. And although located within State lines, yet, so long as their tribal customs are adhered to and the Federal Government manages their affairs by agent, they are not regarded as subject to the laws, at least so far as marriages and inheritance are concerned. The Constitution of the United States especially authorizes Congress to regulate commerce with the Indian tribes as with foreign nations. The customs and laws of the Indians then prevailed among the remnants of tribes located in this State in 1829 and 1830, and would continue unless positively changed by the Legislature of the State, and no such legislation has ever been attempted. A marriage, therefore, among them according to their custom, would for the purpose of inheritance, at least, be valid.
5. *Wills, contests concerning—Instructions—Legitimacy—Death of parents and offspring—Presumption.*—Where the parents and their offspring are all dead, the presumption is in favor of the legitimacy of the offspring; and in contests concerning wills where the question arises, it is proper to instruct the jury to that effect.

Appeal from Johnson Circuit Court.

F. M. Black, with Brown & Case, for Appellants.

I. There is no cause of action stated in the petition. It is not stated, that the former executrix or the present administrator have, or ever had, anything for distribution, nor that there will be anything after the payment of debts. It does appear, that this suit was commenced within three months after the death of the testator, and before the debts could be ascertained, or any distribution had. The petition describes no property, real or personal, nor can any judgment for money or property be had. There is no subject matter stated upon which the Court can render any judgment or decree known to the law. (Garner vs. McCullough, 48 Mo., 318; Riddle vs. Boyce, 13 Mo., 532; Smith vs. Turner, 4 Ired. Eq., 437.)

II. Again: The 47th section of statute of wills (Wagn. Stat., 1370,) under which it is claimed this suit is brought, furnishes no authority for such a proceeding as this. That section expressly provides for cases where the devisees, legatees or heirs have received something which they are required to refund.

No adjudicated case has been found where intestacy has been declared, when no specific relief was asked and no defined judgment or decree could be given.

III. Nothing short of an agreement between two persons of opposite sexes to live together during their lives as man and wife, to the exclusion of all others, and without the power to dissolve the same at their own volition, constitutes a marriage as known to our laws and Christian communities. (Bish. Mar. and Div., 32; Self. Mar. and Div., 1; Schouler on Dom. Rel., 22); and defendant's third instruction should have been given.

IV. The general rule, that a marriage, valid where celebrated, is valid everywhere, is a matter of comity of nations and States; and when an alleged marriage does not contain the essential elements of a marriage as known to our laws, it ought not to be enforced. It is no marriage. (Roche vs.

Washington, 19 Ind., 53; Hyde vs. Hyde, Law Rep., 1st Courts of Prob. and Div., 130; Story on Con. Law, 7 *e*, sec. 114.)

While the forms of the contract, the rights and ceremonies for a due celebration, are governed by the law of the place of the contract or celebration, yet the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled, and in which the matrimonial residence is contemplated. (Story on Con. Laws, (7th Ed.,) 124. *b*; Brock vs. Brock, 7 Jur., N. S., 422; Also, reported in 9 House of Lords Cases, p. 192.)

Such marriages, where the contract does not contain the essential element, as measured by our laws, and where the parties or either of them, or the territory in which they reside, are subject to State laws, are held no marriages at all. (Roche vs. Washington, 19 Ind., 53; State vs. Ta-cha-na-tah, 64 N. C., 614.)

Philips & Vest, Tichenor & Warner, with D. A. N. Grover, for Respondents.

I. The form of proceeding adopted by plaintiffs is the proper one. The descent of plaintiffs, and all the facts necessary to give them their right, were denied by Mary A. Troost, who, as executrix and sole legatee, was in possession of the estate of Wm. Gilliss, deceased, and proceeding to execute the will according to its terms, when this suit was commenced. This suit is instituted under the 9th section of 2 Wagn. Stat., (ch. 145,) in regard to wills, and which was the 30th section of the chapter on wills in the statutes of 1835. (Hill vs. Martin, 28 Mo., 78; Block vs. Block, 3 Mo., 407, Hockensmith vs. Slusher, 26 Mo., 237; Beck vs. Metz, 25 Mo., 71; Bradley vs. Bradley, 24 Mo., 311; Levin vs. Stephens, 7 Mo., 90; Guitar vs. Gordon, 17 Mo., 408.)

II. The court properly submitted the issues of fact to the jury. (Wagn. Stat., 1040-1, §§ 12, 13; Morris vs. Morris, 28 Mo., 117; Weil vs. Kume, 49 Mo., 158: Looker vs. Davis, 47 Mo., 140; Curtis vs. Sutter, 15 Cal., 263; Weber vs. Marshall, 19 Cal., 447; McCarty vs. Edwards, 24 How. Pr., 236.)

III. The evidence clearly shows a valid marriage between William Gilliss and Kahketoqua, the mother of Nancy, and grand-mother of plaintiffs. (Johnson vs. Johnson, 30 Mo., 88.)

IV. General reputation and cohabitation are evidence of marriage. (Wm. Johnson vs. Wm. Johnson, 1 Des., 595; Weaver vs. Cryer, 1 Dev. Law, 337; Fetts and wife vs. Foster, 1 Tayl., 72; Allen vs. Hall, 2 Nott & McCord, 438; Ford vs. Ford, 4 Ala., 144; Wall vs. Williamson, 8 Ala., 48; Wall vs. Williamson, 11 Ala., 838; Morgan vs. McGhee, 5 Humph., 13; Chesseldine's Lessee vs. Brewer, 1 Harris & McHenry, 152; Fornshill vs. Murray, 1 Bland Ch., 482; Taylor vs. Shewwell, 4 B. Mon., 576; Crozier vs. Gaud and Wife, 1 Bibb., 357; Stover vs. Boswell's Heirs, 3 Dana, 232; 1 Penrose & Watts, 450; Johnson vs. Johnson's Adm'r, 30 Mo., 85; Buchanan vs. Harvey, 35 Mo., 276; Johnson vs. Johnson, 46 Mo., 597; 23 N. Y., 91.)

V. Marriages, among Indian tribes, must be regarded as taking place in a state of nature; and if according to the usage and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. This applies to marriages between persons of pure Indian blood, or between white and Indian races. (Wall vs. Williamson, 11 Ala., 839; Johnson vs. Johnson's Adm'r, 30 Mo., 72; Morgan vs. McGhee, 5 Humph., 13.)

VI. In Wall vs. Williamson (*supra*), which decision is quoted and approved by this court in Johnson vs. Johnson, it is held that though the act of 1832 extended the jurisdiction of the State of Alabama over the Indian territory; yet it does not take from a marriage among the Choctaws, made according to their customs, dissoluble quality at the pleasure of the parties; nor can the asking a reservation under a treaty, nor the acceptance of a patent from the United States, nor the continued residence and cohabitaion in the State for more than five years, after the ratification of the treaty, and the departure of

most of their tribe to the west, have that effect. Their usages and customs are abolished only by positive law.

VII. Abandonment of wife, according to the custom of a tribe, has the same effect as a decree of divorce. (Wall vs. Williamson, 8 Ala., 48.)

VIII. It is clear, both upon authority and upon general principles of public policy and natural equity, that when the legitimacy is called in question, especially after the death of the children, and after a great lapse of time, every reasonable presumption is indulged in favor of legitimacy. The jury are bound to make every intendment, in favor of the legitimacy of the children, and not necessarily excluded by the proof. (Johnson vs. Johnson's Adm'r, 1 Des., 595, *supra*.)

IX. This suit is brought under section 9, (Wagn. Stat., ch. 145,) and is in accordance with Hill vs. Martin, 28 Mo., 81; Guitar vs. Gordon, 17 Mo., 408.

X. When a question of legitimacy becomes involved in controversy, in a court of chancery, it is said to be usual to make up an issue and have the matter tried by a jury. Fornshill vs. Murray, 1 Bland Ch., 485; Johnson vs. Johnson's Adm'r, 1 Harris & McHenry, 152, *supra*.)

The appellants say respondents bring their suit under section 47 of chapter on wills, and that said section contemplates cases only, where devisees, legatees or heirs have received and are required to refund. This court has passed upon this very point, against the position of appellants, in Levin vs. Stephens (7 Mo., 90); and the statutes of 1835, which that decision interprets, are identical with present statutes.

Napton, Judge, delivered the opinion of the court.

This suit was brought under the 9th and 47th sections of the act concerning wills (Wagn. Stat., 1365). The plaintiffs in their petition state that the decedent William Gilliss and Kahketoqua, an Indian wowan, child and daughter of Laharsh, a chief of the Piankeshaw nation or tribe of Indians, in the life-time of said Gilliss, and in the Indian country, about the year eighteen hundred and thirty, were married as hus-

band and wife, and for a long time thereafter cohabited and lived together as such husband and wife, that there was issue of said marriage, to-wit: Nancy Gilliss; that said Nancy was the only issue or child of said marriage; that said Nancy was twice married, first, to Joseph Boyer, who, having died, she was secondly married to James Charley. That plaintiff, Francis Boyer, is the sole child and issue of said first marriage, and plaintiff, James Charley, Junior, is the sole child and issue of said second marriage. That said Nancy afterwards, in the year 1862, died leaving plaintiffs her only children, issue and heirs. That said Kahketoqua, wife of said Gilliss and mother of said Nancy, died about the year 1863, having had an only child and issue, the said Nancy. That William Gilliss, said decedent, about the 19th day of July, 1869, died, having first made his will. That said Gilliss died, leaving, then living, no child or children or descendant of any child or children except plaintiffs, children, as before stated, of said Nancy and grand-children of said Gilliss, and so died leaving no widow, and that plaintiffs are the only heirs of said testator, Gilliss. Plaintiffs file the will of said Gilliss and make it part of their petition, and state that by said will defendant, Mary A. Troost, was appointed executrix thereof; that said Mary A. Troost caused said will to be admitted to probate in the Probate Court of the county of Jackson, and took out from said court letters testamentary as the executrix of said will, and was proceeding to administer the estate and execute said will according to the terms and provisions thereof; that by said will said testator devised and bequeathed to defendant, Mary A. Troost, the whole of his estate, real and personal, worth four hundred thousand dollars, except two nominal bequests of ten dollars each, which plaintiffs consent shall be paid.

Plaintiffs in their petition, further state that they are descendants and children of said Nancy, who was a child of said testator, William Gilliss; and although such descendants and children, they, the said plaintiffs, are not and were not, in or by said will or any of its provisions, named or provided for,

nor was nor is said Nancy, mother of plaintiffs, so named or provided for. On the contrary, said will makes no provision for them or either of them, nor are they or either of them mentioned or named in said will.

The petition further alleges, that by the law said testator, as to plaintiffs, his said grand-children, and their mother, said Nancy, not named or provided for in or by said will, is deemed to have died intestate, and that they, said plaintiffs, are entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and that they are entitled to have the same assigned to them. And plaintiffs pray the court to declare and adjudge the intestacy of said William Gilliss as to plaintiffs, and for contribution accordingly from said defendant as executrix and legatee, and for such other and further relief as the court shall deem right and proper.

The suit, as originally brought, was against Mary A. Troost as executrix and also as legatee under the will. Defendant, Mary A. Troost, died, leaving a will by which she disposed of her whole estate, including that derived by her under the will of the said William Gilliss, and the suit was revived against her executors, the defendants, Donnelly and Black.

Defendant, Mary A. Troost, as executrix and also as legatee, made answer to the petition; and in the answer protested that plaintiffs' petition does not state facts sufficient to constitute a cause of action against defendant, as executrix, to be answered unto, nevertheless for answer, defendant in substance states that she had no sufficient knowledge or information to form a belief whether Kahketoqua was the child and daughter of Laharsh and says it is not true; and she denies that said testator, William Gilliss, and said Kahketoqua, in the lifetime of said William Gilliss and in the Indian country, about the year 1831, or at any other time, were married as husband and wife; denies that they for a long time thereafter or for any length of time, cohabited and lived together as husband and wife; denies that there was any issue of any marriage between Gilliss and Kahketoqua, and says if Kahketoqua did leave a child it was not lawfully begotten by the testator.

Whether said Nancy was twice married and had children as stated in the petition, she had no knowledge or information sufficient to form a belief; admits that Gilliss died testate as stated in petition; denies that plaintiffs (or either of them) are the heirs of testator Gilliss; says it is not true and denies that Gilliss left no legal heirs and representatives other than plaintiffs, and states the fact to be that Gilliss left surviving two legal heirs and representatives, and only two, to-wit: Sophia Gilliss and Mary Gilliss, both named in said will and provided for, and alleges that they are both living; admits her appointment by the will as executrix, that the will was admitted to probate, that letters testamentary were granted her, and that she assumed the burden of administering under the will; says she has no sufficient knowledge or information to form a belief whether plaintiffs are the children of said Nancy, and denies that said Nancy was or that plaintiffs are legal heirs of Gilliss; admits that plaintiffs are not named in said will and that the will makes no provision for plaintiffs or either of them; denies that by the law said testator, as to plaintiffs or either of them, died intestate, and denies that they are entitled to any portion or part of the property, real or personal or mixed, of which said Gilliss died seized or possessed, and asks to be discharged with costs.

To defendant's answer there was a replication by plaintiffs.

In the progress of the cause in the court below and on the application of Sophia Gilliss and Mary Gilliss, they were admitted as parties defendants. They filed answer in substance denying plaintiffs' right as asserted and claiming to be children and heirs of the testator Gilliss, and entitled to share in the estate, and charging that the defendant, Mary A. Troost, had, by fraud and other means, procured the making and execution of the will, by which they were each cut off with a bequest of the nominal sum of ten dollars.

Portions of the answer were ruled out and the remaining portions replied to by plaintiffs.

In the further progress of the cause, defendant Mary A. Troost having died, defendants Donnelly and Black as ex-

ecutors of her will were made defendants, and the suit revived against them. Defendants Donnelly and Black having entered their appearance, with the permission of the court, adopted as their answer the answer of their testatrix, Mary A. Troost.

In the further progress of this cause and at the trial term thereof, and before the jury was called or sworn, the court, on motion of plaintiffs, decided to have prepared for submission to the jury issues upon questions of fact, and under the directions of the court such issues were accordingly framed, and are as follows:

The court submits to the jury for trial the following issues: First. Were William Gilliss and said Kahketoqua, an Indian woman, married about 1830, and did they live together as husband and wife? Second. Did they, the said William Gilliss and Kahketoqua, have issue, and was the said Nancy Gilliss the issue and only issue of said marriage? Third. Are the plaintiffs, Francis Boyer and James Charley, Junior, the descendants and only descendants of said Nancy Gilliss? Fourth. Had the said Kahketoqua and Nancy Gilliss died before the commencement of this suit, to-wit: before the 15th day of October, 1869? Fifth. Did said William Gilliss, before the commencement of this suit, die, having first made his last will as stated in plaintiffs' petition? Sixth. Did said William Gilliss, the testator, die, leaving plaintiffs, Francis Boyer and James Charley, Junior, descendants of said Nancy, but in his last will omit and fail to name and provide for plaintiffs or either of them as descendants of said Nancy Gilliss, and did he also fail and omit to name or provide for said Nancy Gilliss? Seventh. Are the said Sophia Gilliss and Mary Gilliss children and heirs of William Gilliss, and are they both named and provided for in the said will?

The defendants objected to the submission of issues or questions of fact to the jury.

The court overruled defendants' objections, and ruled and decided to call a jury to try the issues of facts as framed, and thereupon a jury was called and sworn, and plaintiffs were

about to proceed with their evidence, when defendants, in writing, made and presented to the court their objections to any and all evidence offered or intended to be offered by plaintiffs.

The objections of defendants were by the court overruled, and plaintiffs proceeded with their testimony, and the trial of the issue progressed.

The evidence in the case is voluminous and conflicting. It is unnecessary to state it in detail, as the questions of fact were submitted to a jury, under instructions which will be noticed.

The main fact in dispute was as to the marriage of Gilliss with an Indian woman, named Kahketoqua, a daughter of a chief of the Piankeshaws. Gilliss it seems had a trading post at the James' Fork of White river, among the Delaware tribe of Indians, and had successively two wives, who were Delawares, and acknowledged the children of these wives. About the year 1829 or 1830, he proposed to Laharsh, a Piankeshaw chief, to marry his daughter, named Kahketoqua, and employed a man named Baptiste Peoria to negotiate the marriage. Laharsh was then living at Cowskin creek in the Indian country. This Baptiste Peoria, who is the principal witness for plaintiffs, visited Laharsh and reported favorably to Gilliss, and Gilliss and Peoria then went down to the settlement in Cowskin creek, and carried with them presents to the father and mother of Kahketoqua, which were satisfactory and returned with Kahketoqua. Nancy Gilliss, the mother of the plaintiffs, was the offspring of the cohabitation or marriage. There was evidence to show a subsequent recognition of Kahketoqua and her child, and there was evidence to the contrary.

The greater part of the evidence against the marriage is of a negative character, that is, it is of persons who were about Gilliss' domicile, but who knew nothing of the Piankeshaw woman as his wife. There seems to be no question, that the plaintiffs are descendants of Nancy Gilliss, who was reputed to have been the daughter of the Piankeshaw, wife of Gilliss.

In regard to the custom among the Indians in relation to marriages, there seems to have been but little conflict of testimony. The contract was arranged with the parents, and, if the presents were satisfactory, the parents usually assented.

Marriages were dissolvable at the option of the parties. In this case Gilliss sent Kahketoqua back, after living with her for a few months, promising however to recall her, when he returned from the East. There is evidence that he sent presents to her child, Nancy, the mother of the plaintiffs.

The first, second, third, fourth, fifth and sixth issues the jury found affirmatively and for plaintiffs, and the seventh issue they also found affirmatively.

On the trial, and after the evidence was closed, plaintiffs asked instructions as follows:

1st. "If the jury believe from the evidence, that the testator, William Gilliss, and said Kahketoqua, an Indian woman, about the year 1830 were married in the Indian country and according to Indian usages, and as husband and wife lived and cohabited together, and that there was issue of said marriage and cohabitation, and that said Nancy Gilliss was the issue and only issue of said marriage and cohabitation, and shall further believe that the plaintiffs, Francis Boyer and James Charley, Junior, are the descendants and only descendants of said Nancy Gilliss, and shall further find that said Kahketoqua and Nancy Gilliss died before the commencement of this suit, and shall further find that said testator died leaving his last will as stated in plaintiffs' petition, and so died leaving plaintiffs, Francis Boyer and James Charley, Junior, descendants of said Nancy Gilliss, and in his said last will failed and omitted to name or provide for plaintiffs as descendants of said Nancy, and did also fail and omit to name or provide for said Nancy Gilliss, then the jury must find for plaintiffs on the first six issues submitted to the jury."

2d. "If the jury believe from the evidence, that the testator, William Gilliss, took said Kahketoqua, an Indian woman, in the Indian country, about the year 1830, as his wife, according to the usages prevailing among the Indians, and co-

habited with said Kahketoqua, and had by her issue, as stated in the petition, then they must find the first issue for plaintiffs."

3d. "If the jury believe from the evidence, that the said William Gilliss, about the year 1830, was married to an Indian woman named Kahketoqua, in the Indian country, according to Indian usages, and had by her Nancy Gilliss, as the issue and only issue of said marriage, such issue is legitimate, although the jury may believe, that by Indian usages said Gilliss had a right to abandon said Kahketoqua at any time after said marriage, then the jury must find the first two issues for plaintiffs."

4th. The court further instructs the jury, "if you should believe from the evidence, that Nancy Gilliss was the child of William Gilliss and an Indian woman named Kahketoqua, and shall further believe from the evidence that Gilliss, Kahketoqua and Nancy are all dead, the legitimacy of said Nancy being called in question, you should give every reasonable presumption in favor of her legitimacy not necessarily excluded by the evidence."

5th. It is admitted by the pleadings in this case, that William Gilliss died before the commencement of this suit leaving his last will, and it is further admitted by the pleadings that said William Gilliss, the testator, in his said last will failed and omitted to name or provide for plaintiffs as descendants of said Nancy Gilliss, and that he the said Gilliss did so fail and omit to name or provide for said Nancy Gilliss in his said last will.

6th. It being charged and alleged in the answers in this case that said testator, William Gilliss, left him surviving, two legal heirs, to-wit: Sophia Gilliss and Mary Gilliss, this is an admission by defendants of the legitimacy of said Mary and Sophia Gilliss.

All which instructions, from one to six inclusive, were given by the court, and excepted to by defendants, Donnelly and Black.

Plaintiffs also asked other instructions, which were refused by the court, and excepted to by plaintiffs.

Defendants asked instructions as follows:

1st. "The court instructs the jury that as there is no controversy between plaintiffs and defendants as to the fifth and seventh issues submitted to them by the court, it being admitted that, as to the fifth issue, William Gilliss died before the commencement of this suit, he having first made his last will, and, as to the seventh issue, that Sophia Gillis and Mary Gillis are children and heirs of said William Gilliss, and are both named and provided for in the said will, the jury will find said issues in the affirmative, and as to said issues return the following verdict: 'We, the jury, find the fifth and seventh issues, submitted to us by the court, in the affirmative.'"

2nd. "Although the jury may find the third, fourth and sixth issues submitted to them by the court in the affirmative, and may find as to third issue, that plaintiffs, Francis Boyer and James Charley, Jr., are the descendants and the only descendants of said Nancy Gilliss; and as to the fourth issue that said Kahketoqua and Nancy Gilliss died before the commencement of this suit, on the 15th day of October, 1869; and as to the sixth issue, that said William Gilliss, the testator, did die leaving the plaintiffs, Francis Boyer and James Charley, Junior, descendants of said Nancy, but in his last will did omit and fail to name or provide for plaintiffs or either of them as descendants of said Nancy Gilliss, and did also fail and omit to provide for said Nancy Gilliss, yet their so finding said third, fourth and sixth issues in the affirmative must in no wise control or influence their finding as to the said first and second issues, and the jury may so find said third, fourth and sixth issues, or any or all of them, in the affirmative, and yet may still find first and second issues in the negative for the defendants."

3rd. "The court instructs the jury that although the jury may believe from the evidence, that said Gilliss and Kahketoqua were actually married according to the usage and custom of the Indians, and did thereafter live and cohabit together

as husband and wife for five or six months, and that said Nancy was the issue of such cohabitation, and that plaintiffs are the only descendants of said Nancy, and that after such cohabitation said Gilliss sent said Kahketoqua back to her tribe; yet unless the jury further find from the evidence, that at the time of such marriage said Gilliss and Kahketoqua did mutually contract and agree to become and be husband and wife so long as they both should live, to the exclusion of all others, by a mutual obligation, which during the said life-time of the parties neither one by his or her own volition or act could dissolve, then the jury are bound to find said first and second issues in the negative."

4th. "Although the jury may believe from the evidence that said William Gilliss did take the Indian woman, Kahketoqua, to his house at James Fork Trading Post, about the year 1830, and did cohabit with her for four to six months, and during that cohabitation did beget of her body the child Nancy, and that the plaintiffs are the only issue of said Nancy; yet if the jury further believe from the evidence, that said William Gilliss was, prior, during and subsequent to said year 1830, a citizen of the State of Missouri, residing within this State, and that the tribe of the Piankeshaw Indians, of which said Kahketoqua was a member, was at that time living within this State, and that Laharsh, the father of Kahketoqua, and others of his family and a few other families, temporarily crossed over the line of this State, into the Seneca Indian Territory, on a hunting trip, intending, after the hunt was over, to return to their tribe in this State, and that whilst in said Seneca Indian country, said Gilliss crossed over the line of this State to the camp of said Laharsh, in said Seneca Indian Territory and then and there, according to the usage and custom of the Piankeshaw Indians in case of marriage, made presents to the parents, Laharsh and wife, and took said Kahketoqua, and immediately thereafter went with her, her mother and brother, to his house at James Fork Trading Post, in this State, and there cohabited with her for several months, and then sent her mother and brother back to their tribe, and did not there-

after live with or treat her as his wife, then in law, there was no marriage betwen said Gilliss and Kahketoqua, and the jury are bound to find said first and second issues in the negative."

5th. "Although the jury may believe from the evidence, that in the Fall or Winter of 1829, William Gilliss took the Indian woman, Kahketoqua, in the Indian country, across the line of this State, and there cohabited with her in this State, for four or five months, when they separated, and she went to her people, and that they were thus married in accordance with the usage and customs among the Piankeshaw Indians, and by such cohabitation, there was issue; still if you believe that at the time Gilliss took Kahketoqua, she was only temporarily across the line with her father, on a hunting expedition, and her people and Gilliss lived in this State of Missouri, that by such usage and custom, either party had the right to separate at any time, and take another man or woman, and that the man had the right to have two or more such wives at one and the same time, then there was no marriage between the said Gilliss and Kahketoqua, as is required to be shown by plaintiffs in this case, and you will find the first and second issues in the negative."

6th. "Although the jury may believe from the evidence, that said William Gilliss did go from his house in Missouri to the camp of Laharsh and his wife, the father and mother of Kahketoqua, a Piankeshaw Indian woman, in the Seneca Indian Territory, and did then and there make such presents to them as were usual and customary among said Piankeshaw Indians in case of marriage, and did thereafter take said Kahketoqua, her mother and brother, to his house at James Fork Trading Post, and did there live and cohabit with her for several months, and up to the spring of the year, and during such cohabitation did beget of the body of said Kahketoqua the said Nancy, and did afterwards, in said spring of the year, and before the birth of said Nancy, send said Kahketoqua, her mother and brother, back to their tribe, and did not thereafter live or cohabit with her as his wife; yet these facts alone

do not necessarily constitute an actual marriage between said Gilliss and Kahketoqua; and unless the jury find that the plaintiffs have affirmatively proved to the satisfaction of the jury, that the said William Gilliss and Kahketoqua did then and there actually contract and agree, each with the other, to become and to live together as husband and wife, and did thereafter, in pursuance of such contract and agreement, cohabit together, not merely for casual and temporary sexual commerce and gratification, but as husband and wife, for the purpose of that relation for an indefinite time, then the jury are bound to find said first and second issues (in the negative) for the defendants."

7th. "Unless the jury believe from the evidence, that William Gilliss and Kahketoqua were actually married, and that there was issue of such marriage, you will find the first and second issues in the negative, and in order to constitute marriage, they must have mutually agreed to be and to live together as husband and wife for an indefinite period; that cohabitation and children thereof does not constitute marriage, and if such cohabitation is a casual commerce between the sexes, or for temporary purposes only, it is not even evidence of marriage, but in order to be evidence of marriage they must not only have lived together as man and wife, but must have held themselves out to the world as sustaining that honorable relation towards each other."

8th. "The jury are instructed that if they believe from the evidence, that any witness or witnesses have sworn intentionally falsely to any material fact or facts in the case, then the jury are authorized to disregard and reject the entire testimony of such witness or witnesses."

The first, second, sixth, and eighth of which instructions asked by defendants the court gave, but refused the third, fourth, fifth, and seventh.

Defendants in due time, after the verdict of the jury was returned into court, which was for the plaintiffs, filed their motion in arrest of judgment, and therein assigned grounds as follows: 1st. The petition does not state facts sufficient

to constitute any cause of action in plaintiffs against defendants, or to entitle plaintiffs to the relief prayed for in their petition or any other relief whatever. 2d. Upon the record said judgment is erroneous. 3d. The court has no jurisdiction over the subject matter of the pretended action. 4th. The court erred in permitting plaintiffs to introduce any evidence against the objection of defendants, when the petition does not state facts sufficient to constitute any cause of action in plaintiffs against defendants, and the court had no jurisdiction over the subject matter of the pretended action.

Defendants also, in due time, filed in writing their motion for a new trial, and assigned therein grounds as following: 1st. The court erred in framing and submitting said issues to the jury. 2d. The court erred in admitting improper, illegal, incompetent and irrelevant evidence on the part of the plaintiffs against the objections of defendants. 3d. The court erred in rejecting and excluding proper, legal, competent and relevant evidence offered by defendants, on the objections of plaintiffs. 4th. The court erred in giving the instructions numbered one, two, three, four, five and six asked by plaintiffs, and given at their instance by the court. 5th. The court erred in refusing to give the instructions numbered three, four, five and seven asked by defendants. 6th. The finding of the jury on said issues is against the instructions of the court and contrary to law. 7th. The finding of the jury on said issues is against the evidence and the weight of evidence in this cause. 8th. The finding of the jury is against the law and evidence.

The court below gave judgment and made decree as follows:

Now at this day came the parties aforesaid, and the jury by their verdict made and returned here into court found the first six of the issues submitted to them by the court affirmatively and for plaintiffs, and having also found the said seventh issue affirmatively, and it appearing also by the will of said testator, William Gilliss, that neither plaintiffs, Francis Boyer and James Charley, Jr., nor their mother, the said Nancy Gilliss or any or either of them were named or provided for in said will of said testator, William Gilliss.

It is therefore considered adjudged and decreed that said testator, William Gilliss, so far as regards the said plaintiffs, Francis Boyer and James Charley, Jr., descendants of the said Nancy Gilliss, not provided for, and as to said plaintiffs, Francis Boyer and James Charley, Jr., is deemed in law to have died intestate, and as to said plaintiffs, the court doth declare said testator's intestacy.

And the court doth further consider, adjudge and decree that said plaintiffs, as the children and descendants of the said Nancy Gilliss, are entitled to such proportion of the estate of said testator, William Gilliss, real and personal as if he had died intestate. And the jury having found that said testator died leaving also as his children and heirs at law, the said Sophia Gilliss and Mary Gilliss named and provided for in said testator's will, it is further considered, adjudged and deemed, that said plaintiffs, Francis Boyer and James Charley, Jr., as children and descendants of the said Nancy Gilliss, deceased, and heirs at law of the said William Gilliss, are entitled and have right to one child's share, to-wit: the one equal undivided third part and interest in the estate of said testator, William Gilliss, real and personal, and that the same ought to be and shall be assigned to them by the defendants, and by the said Probate Court of Jackson County. And the court doth further consider and decree that said plaintiffs recover against the defendants their costs in this behalf expended to be levied of the share and interest in the estate of said Wm. Gilliss of the said Mary A. Troost under the will, in the hands of said Michael Dively, administrator *de bonis non* of the said estate unadministered, and of the estate and assets of said Mary A. Troost, deceased, in the hands of said Bernard Donnelly and Francis M. Black, executors of the last will of said Mary A. Troost, unadministered, except so much of said costs as may have been occasioned by the said Sophia Gilliss and Mary Gilliss Rogers, which shall be taxed against them, and for which judgment is given against them.

The first question raised in this case, is as to the form of the action. It is insisted that the proceeding is premature,

and that no specific relief is asked. No property, real or personal, is specified, and no subject matter upon which a judgment could operate.

This question was raised in the case of Levins vs. Stephens, (7 Mo., 91,) under a statute which was substantially in the terms of the present act. The 47th section of our present law (Wagn. Stat., p. 1370) is a mere copy of the 33rd section of the Revised Code of 1835 and contains the same word "received," which gave occasion to the discussion and decision in that case, from which we have no disposition to depart.

The second objection taken here, is to the action of the court, in submitting issues to a jury. The 13th section of art. 9 of our Practice Act (Wagn. Stat., 1041) provides that the court in cases of the character of this, may take the opinion of a jury, upon any specific question of fact involved, by an issue made up therein for that purpose. Although this court has determined that such verdicts are not binding on the court, yet no objection is perceived to the course adopted in this case.

The main questions, however, arise out of the instructions under which the case was submitted to the jury; and these instructions, it will readily appear, are intended to follow the law, as stated by this court, in the case of Johnson vs. Johnson, 30 Mo., 72.

The facts in the present case, it is true, are materially different from the facts in the case of Johnson vs. Johnson; but so far as the existence of a marriage is concerned, the evidence in this case was greatly stronger than in the other. There was no evidence of the marriage of Col. Johnson and the daughter of Keokuk, but cohabitation and the birth of three children. But if the testimony of Baptiste Peoria is to be credited (and of that the jury were to judge) there was not simply a cohabitation between Gilliss and Kahketoqua, but probably quite as formal a marriage as was customary among the Indians. A messenger or interpreter was sent by Gilliss to the parents, who lived some sixty or seventy miles

south of the trading post on James Fork, to ascertain if Gilliss' proposals would be acceptable to the father and mother, and upon a favorable response, Gilliss immediately started with his messenger or agent down to Cowskin, with pack mules, carrying presents of blankets, beads, shawls, etc., to the father and mother of the proposed bride. He immediately returned with Kahketoqua, and her mother and brothers accompanied her to the trading station, thereby indicating an approval by all the family of the arrangement.

This was, undoubtedly, strong evidence of an Indian marriage, in which all the witnesses agree no ceremony was required, religious or otherwise, and in which the main feature is the consent of the parents of the proposed wife, and their acceptance of the presents offered.

But it is insisted that this marriage was of no validity, by the laws of Missouri, and that in 1829 or 1830, the Piankeshaw Indians were citizens of this State, and subject to our laws. It seems from the testimony, that the Piankeshaws and Weas and Delawares and Shawnees were removed from Missouri, anterior to the alleged marriage; but that Laharsh, who was a Piankeshaw Chief, remained in the neighborhood of Cowskin Creek, perhaps for the purpose of hunting.

The Constitution of the United States, and the statutes passed in pursuance thereof, undoubtedly recognized the Indian tribes as a peculiar people, having relations to the government totally different from citizens of the States. Although located within the State lines, yet so long as their tribal customs are adhered to, and the Federal Government manages their affairs by agents, they are not regarded as subject to the State laws, so far at least, as marriage, inheritance, etc. are concerned. The cases of Morgan vs. McGhee, (5 Humph., 13,) and Wall vs. Williamson, (11 Ala., 826,) establish this proposition. Indeed the Constitution of the United States especially authorizes Congress to regulate commerce with Indian tribes, as it does with foreign nations. The customs and laws of the Indians, then, prevailed among the remnants of tribes located here in 1829 and 1830, and would con-

tinue unless positively changed by the legislature of the State. No such legislation was attempted, and it is useless to inquire if it had been, whether it would have been valid.

The first instruction is particularly objected to. That instruction directed the jury, if Gilliss, Kahketoqua and Nancy are all dead, to give every reasonable presumption in favor of the legitimacy of Nancy, not necessarily excluded by the evidence. This doctrine is asserted by the court in Johnson vs. Johnson, and supported by the authorities there cited. The jury had a right to be instructed on this point. The legitimacy of Nancy is a material point in this case, and as she was dead, and her mother and reputed father, it was necessary to tell the jury what the presumption of the law was.

It is useless to examine the instructions in detail. They are manifestly a mere repetition of positions which the court adopted in Johnson vs. Johnson, and the only question is, whether we will review and overturn the principles of that case.

We have no disposition to do so and therefore affirm the judgment; the other judges concur.

STATE OF MISSOURI, Respondent, *vs.* DAVID HARPER, Appellant.

1. *Liquors, selling of—License by city council does not relieve from obligation to pay county license.*—When a town or city charter does not exclude the right of the County Court to demand a license, a license from the city or town will not relieve from the obligation to obtain one from the county.

Appeal from Jasper Circuit Court.

B. F. Garrison, for Appellant.

Attorney General, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant in this case was indicted for selling liquor without a license, and he justified by pleading a license from

the city of Carthage, which he insisted exempted him from procuring a State and county license. The clause in the city charter relied on, gives the city council power "to tax, restrain, prohibit, and suppress dram shops." The ordinance read in evidence provides for a tax on licenses, but there was no attempt made to either restrain or prohibit. Upon these facts, the court found the defendant guilty, and assessed a fine against him.

Unless there be something in the language of the city charter to give it the exclusive right to tax or license, such exclusive power will not be presumed. The powers conferred on municipalities are subordinate to the powers of the legislature over the same subject, and the latter will never be presumed to have abdicated their rights to exercise these powers unless it is plainly so stated, or there is a necessary inconsistency between the different enactments.

A municipal corporation is a mere agency of the State government, and there is nothing inconsistent in the exercise of the concurrent power of taxation by both.

In the present case the power vested in the city to tax does not prohibit the State and county from taxing also. The point has been repeatedly adjudged, that where a town or city charter contains nothing which excludes the right of the County Court to demand a license, a person will not be protected from indictment by showing that he has a license for his act from the municipal authority; he must show in addition, that he has obtained one from the County Court. (State vs. Sherman, 50 Mo., 265; Austin vs. State, 10 Mo., 595; Harrison vs. State, 9 Mo., 526.)

Judgment affirmed; the other judges concur, except judge Vories, who is absent.

JOHN L. KECK, TRUSTEE OF MARTIN KECK, Respondent, *vs.* S. J. FISHER, ADM'R OF EST. OF HENRY WOLFKALL, DEC'D, Appellant.

1. *Partnership—Rights of partners as to disposition of partnership property—Agency.*—Each member of the partnership, as to the property and business of the firm, is the agent of all the others, and has full power and authority to sell, pledge or otherwise dispose of any effects belonging to the firm for any purpose within the scope of the partnership. (Clark vs. Rives, 33 Mo., 579, affirmed.) This rule does not apply to real property; in conveying it each member of the firm must join.

2. *Partnership—Personal property, mortgage of—Execution—Acknowledgment.*—Under our statute, which requires mortgages of personal property to be acknowledged as conveyances of land are by law required to be acknowledged, a mortgage by a partnership may be signed by any one of the partners, with the firm name, and a partner whose name does not appear in the style of the firm, may so sign the deed and acknowledge it.

Appeal from Jackson Circuit Court.

A. A. Tomlinson, for Appellant.

Raber signed the name of "Helmreich & Co." and acknowledged the instrument.

Raber was not the person whose name is signed to the instrument, and hence it cannot be his deed. The name of "H. Helmreich" is the name signed to the instrument (the word "Co." being surplusage), and he did not sign or acknowledge it, so that it cannot be his deed. It is not Raber's deed because his name is not signed to it, and it is not Helmreich's deed because he neither signed nor acknowledged it; hence it is not the deed of either member of the firm and conveys nothing.

The certificate of acknowledgment states that Raber was personally known to the notary to be the person who signed the foregoing deed as a party thereto. The statute requires the officer to state that the person making the acknowledgment is the same person whose name is subscribed to the instrument as a party thereto. While courts hold that certificates of acknowledgment should be liberally construed, we apprehend that no court has decided, or is likely to decide, that one person can acknowledge the deed of another person unless he be authorized by letter of attorney.

There is no claim that Raber had any authority to sign the name of Helmreich to the deed or acknowledge it. On the contrary Helmreich testifies that he never authorized Raber to sign his name to the deed—never ratified the signing, but sold and delivered the property to pay a firm debt.

Jenkins & Twitchell, for Respondent.

I. A member of a co-partnership has authority to execute, acknowledge and deliver a chattel mortgage or deed of trust upon a co-partnership chattel property for the purpose of securing an indebtedness of the firm of which he is a member. (Clark vs. Rives, 33 Mo., 579; Sto. on Part., § 94 [5th ed.]; Par. on Contr., 183–4 [6th ed.]

II. As one partner has power and authority to execute a deed of trust to secure a debt of the firm, he has also the power to do all other acts essential to the execution of the power, such as to acknowledge the execution for the purposes of registration. (Robinson & Caldwell vs. Mandlin, Montague & Co., 11 Ala., 984.)

III. The certificate of acknowledgment attached to the deed of trust, in this case, contains all the essential requisites of a good and perfect certificate, to-wit: the fact of the acknowledgment by the grantor and the identity of the person. (Bryan vs. Ramirez, 8 Cal., 461; Cavender vs. Heirs of Smith, 5 Ia., 157; Alexander & Betts vs. Samuel Henry, 9 Mo., 510.)

IV. The body of a deed may be referred to to support even a defective acknowledgment. (Bradford vs. Davidson & Campbell, 2 Ala., 203; Robinson & Caldwell vs. Mandlin, Montague & Co., 11 Ala., 977.)

V. Certificates of acknowledgment are to be liberally construed, and when substance is found, it is neither the duty nor inclination of courts to jeopardize titles in any way depending upon them by severe criticisms upon their language.

They will be liberally construed, and sustained if possible, by fair legal intendment. (Morse vs. Clayton, 13 S. & M., 373; Chandler vs. Spear, 22 Ver. [7 Washb.], 388; Jackson,

ex dem Merrill vs. Stanton, 2 Cow., 552, 567; Suffborough vs. Parker, 12 Serg. & Rawle, 48; Hall vs. Gittings, 2 Harr. and John., 390; Talboit's Lessees vs. Simpson, 1 Pet., C. C. R., 191; McIntosh vs. Ward, 5 Bing., 296; Nantz vs. Bailey, 3 Dana, 113, 119; Fuhrman vs. London, 13 Serg. & Rawle, 386; Brooks vs. Chaplin, 3 Ver., 281.)

WAGNER, Judge, delivered the opinion of the court.

This was an action in the nature of replevin, to recover the possession of certain personal property described in the petition. The plaintiff claimed the property as trustee by virtue of a written instrument made in the name of H. Helmreich & Co., which was executed by Charles Raber, a member of the firm. The defendant claimed the property by purchase from one Holden, who bought it from H. Helmreich & Co., subsequent to the execution of the deed to plaintiff. Raber signed the name of H. Helmreich & Co. to the deed, and acknowledged its execution before a notary public. The acknowledgment is as follows: "Be it remembered, that H. Helmreich & Co. by Charles Raber, of the firm of H. Helmreich & Co., who is personally known to the undersigned, a notary public within and for said county, to be the person who subscribed the foregoing deed, as party thereto, this day appeared before me and acknowledged that he executed and delivered the same for the uses and purposes therein contained." It is now contended that Raber had no power to make the deed, without a special authorization from the other partner, and that the acknowledgment is bad.

The first point is surely not sustainable. In Clark vs. Rives, (33 Mo., 579) it was held, that each partner had full power and authority to sell, pledge or otherwise dispose of any effects belonging to the partnership, for any purpose within the scope of the partnership. Judge Story lays it down as the settled doctrine, that by virtue of the community of rights and interests in the partnership stock, funds and effects, each partner possesses full power and authority to sell, pledge or otherwise dispose of the entirety of any particular goods,

wares, merchandise, or other personal effects belonging to the partnership, and not merely of his own share thereof, for purposes within the scope of the partnership. In respect to the shares of his co-partners, he is deemed to do such acts as their agent and as the accredited representative of the firm. Each partner is treated without any nicety of discrimination, and he is deemed to possess a dominion over the entirety of the property, and, therefore, clothed with all the ordinary attributes of ownership. (Sto. Part., § 94.)

The same principle is announced by Chancellor Kent, who says "With respect to the power of each partner over the partnership property, it is settled, that each one, in ordinary cases and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. This power results from the nature of the business, and is indispensable to the safety of the public, and the successful operations of the partnership. He is an agent of the whole, for the purpose of carrying on the business." (3 Kent. Com., 44.) The result of the authorities is, that the act of each partner is considered as the act of the whole partnership, or of all the partners, within the scope of the business of the firm. But in respect to real estate, a different rule prevails, founded on the nature of the property and the provisions of the common law applicable thereto. Each partner is required, both at law and equity, to join in conveyance of real estate, in order to pass the entirety thereof to the grantee; and if one partner only executes it, whether it be in his own name or that of the firm, the deed will not ordinarily convey any more than his own share or interest therein, (Sto. Part., *ubi supra*).

As the property here conveyed was personal property, and the conveyance was made to secure an indebtedness of the firm, the partner had the unquestionable authority, to execute the conveyance without any special authorization for that purpose.

This was a deed of trust and the statute provides that no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the property be delivered to and retained by the mortgagee or trustee, or *cestui que trust*; or unless the mortgage or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged or proved and recorded. (Wagn. Stat., p. 281, § 8.)

Section 7, of the chapter in relation to conveyances of real estate, declares that all deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed. (*Id.*, p. 273.) The 13th section of the same act provides that no acknowledgment of any instrument in writing, conveying real estate, or whereby any real estate may be effected, shall be taken unless the persons, offering to make such acknowledgment, shall be personally known to the officer taking the same, to be the person whose name is subscribed to such instrument as a party thereto or shall be proved, etc. The argument against the validity of the acknowledgment, is this: Raber is not the person whose name is signed to the instrument, and hence it cannot be his deed. The name of H. Helmreich & Co., is the name signed to the instrument, and Helmreich did not sign or acknowledge it, so that it cannot be his deed. It is not Raber's deed because his name is not signed to it, and it is not Helmreich's deed, because he neither signed nor acknowledged it; therefore, it is not the deed of either member of the firm, and conveys nothing.

But this argument is founded upon a total and complete misapprehension. As we have seen before, Raber had full authority, and was the legally empowered agent of the firm to dispose of the property, and execute the instrument, and the statute requires that the deed should be subscribed, sealed and acknowledged by either the principal or his lawful agent. It

follows, that as Raber was the lawful agent, and executed and acknowledged the instrument in the name of the firm, the execution was sufficient and the conveyance valid.

The court below found for the plaintiff and its judgment will be affirmed.

All the judges concur except Judge Vories, who is absent.

AMANDA E. GAINES, *et al.*, Respondents, *vs.* HORACE ALLEN, *et al.*, Appellants.

1. *Contract—Mortgage—Power of Sale—Error obvious on face of instrument—How construed.*—A mortgage with power of sale recited that in case of default in payment of the mortgage debt "the party of the first part," (who according to the phraseology of the deed was the mortgagor,) should proceed to sell, and provided further, that the mortgagee, naming him, should apply the proceeds. *Held*, that the intention was to confer a power of sale on the mortgagee, and that the error was an obvious one on the face of the instrument; and that therefore, it did not require for its removal, the introduction of external evidence.
2. *Agency—Mortgage, sale under—Disability of mortgagee to purchase attaches to his agent.*—The same disability as to purchase at the mortgage sale attaches to the agent of the mortgagee for the collection of the debt as to the mortgagee himself.
3. *Mortgages—Sales by marshal—Agency—Right of mortgagee to purchase.*—Where a mortgage provides that the sale in case of default may be made by the mortgagee, or in case of his refusal to act, by the marshal, the mortgagee and marshal are, for the purposes of making the sale, co-trustees, and the mortgagee cannot, by refusing to make the sale, and thereby procuring it to be made by the marshal, relieve himself of his disability to purchase at the sale.
4. *Mortgages—Purchase at sale by mortgagee—Equity of redemption.*—It is the settled law that where a mortgagee buys the property, at a sale under the power given in the mortgage, the equity of redemption still subsists in the mortgagor.

Appeal from Jackson Circuit Court.

J. Brumback with F. M. Black, for Appellants.

I. The court may conjecture that by mistake "first part" was written for "second part." But the mistake has not been corrected. Until the instrument be reformed the contract can

be enforced only according to its terms, at law and in equity. The court acts on it as it is. (Linton vs. Boly, 12 Mo., 568; Young vs. Casson, 48 Mo., 262; McClurg vs. Phillips, 49 Mo., 316.) A court of chancery would not correct the mistake, no matter how clearly proved, because it was not necessary, and no proof could raise an equity for reformation. The mortgage could have been foreclosed under the statute, at law or in equity, as it is. As the marshal had a power to sell, it was not necessary that Allen should have one. (1 Sto. Eq. Jur., § 141; Henderson vs. Dickey, 35 Mo., 126.) There are cases where a mistake will be disregarded, even at law, and effect be given to the instrument the same as if the mistake had not been made, or it had been corrected. These are cases of clear and obvious mistake apparent on the face of the document, so that the paper corrects the error. This case is not, however, one of that class. (Wilson vs. Wilson, 5 H. of Lords, 66; Kerr on Fraud and Mistake, p. 417.) The object of the parties was to confer a power to foreclose the mortgage. This was done. Therefore a court of law neither would nor could by construction correct the alleged mistake, any more than a court of equity would or could. In neither case was there any reason for correcting the mistake, if any, so as to give a power different from the letter of the mortgage.

II. If Allen had power under the mortgage to sell, he had, too, the right to buy at Hayden's sale in person, or by Smith; and Smith, his agent, was not precluded from buying on his own account. "Where the power to sell is conferred upon a third person the *cestui que trust* may purchase as freely as any other person." (2 Am. Law Reg. N. S., 728, and cases cited; Miltenberger vs. Morrison, 46 Mo., 251.)

III. At most, Allen was in a double relation to the mortgagors. 1st. As creditor having a lien on the land as security. 2d. As trustee of a power to sell to pay the debt. He could act in virtue of either or both relations. He acted by reason of one relation. Why were his rights abridged because the other relation existed, when he did nothing by reason thereof? This was not like a purchase by one trustee from a co-trustee.

Allen and Hayden were not in any sense co-trustees. They could not act together in selling. Neither could control the other selling. Can any one doubt that Hayden could have bought if Allen had sold? The rule and the reason thereof, allowing a *cestui que trust* in an ordinary deed of trust to secure money, to buy, when the trustee sells, and a mortgagee to buy, when a sheriff sells on execution to foreclose a mortgage, applies in this case. (Kirkwood vs. Thompson, 2 De Gex, Jones & Smith, 613; Shaw vs. Bunny, *Id.*, p. 468; Chambers vs. Waters, 3 Sim. Ch. 42; Roberts vs. Fleming, 53 Ill., 196; Walthal vs. Rives, 34 Ala., 95; Harrison vs. Roberts, 6 Fla., 711, is to the same effect; Kerr on Fraud and Mistake, Am. ed. 1872, p. 162.)

Woodson & Sheeley; P. S. Brown; Tichenor & Warner, for Respondents.

I. Sales made by trustees being a harsh mode of disposing of the equity of redemption, should be watched by the courts with a jealous eye, and should not be sustained unless conducted in all fairness and integrity. (Good vs. Comfort, 39 Mo., 328.)

II. Allen by the mortgage had a power coupled with an interest. (Hunt vs. Rousmanier, 8 Wheat., 204; Barnum vs. Messerve, 8 Allen, 158.)

III. The marshal by the mortgage had simply a naked power to sell, and whether he acted or not depended upon the will of Allen. According to the position of defendants, if Allen wished to shirk the duties voluntarily assumed by him, and so rigidly imposed upon him when assumed, he had only to will that the marshal should act. Then in that event, he who carried in himself the legal title to the land in question (8 Allen, 158), and who was by the instrument compelled to distribute, in any event, the proceeds of the sale, could thereby divest himself of the power, simply, and then act in hostility to the interests of those who gave him the power and interest both; at one time under the instrument he is bound by the strictest requirements, at another, and under the same in-

strument, when the mortgagees are "in a greater or less degree in the power and at the mercy of the creditor," (McNees vs. Swaney, *infra*,) by his own motion, no one consenting thereto, he is freed from all such obligations, and this too, in the face of the law which clearly says that when a trust is created and assumed it cannot lightly be thrown off. (1 Vol. Leading Cases in Equity ; Hare and Wallace Notes, 2d ed., 161.)

The defendants seem to argue that because Allen is not compelled to make the sale, but can direct another to make it, his trust ends when he so directs. By the act of the parties of the first part he is given a trust which he accepts, and having accepted he thereby binds himself to act not only for himself but for said parties; (Chesley vs. Chesley, 49 Mo., 540,) and in such a position it becomes his duty to make the land bring as much as possible, and his private interests are in no event to come in conflict with his duty; (McNees vs. Swaney, 50 Mo., 388; Thornton vs. Irwin, 43 Mo., 153,) yet, as claimed by defendants, Allen, by simply getting the marshal to make the sale, changes position and stands as other purchasers, interested to buy the land as cheaply as possible. But the law which says that a trustee or person standing in a situation of trust or confidence shall not purchase or deal with the subject matter of his trust for his own benefit, without the consent of his *cestui que trust* is absolute, universal and is subject to no qualification. (Conger vs. King, 11 Barb., 363; Armstrong vs. Houston's Heirs, 8 Ohio, 553; Thornton v. Irwin, *supra*.)

Under the mortgage in question the marshal derived his authority by the instrument itself and by the act of Allen requesting him to act.

IV. The expression in the condition of the mortgage "party of the first part" is plainly a clerical error and one that would be treated in a court of law as though it read "party of the second part:" if such would be the case in a suit at law, the reasons are much stronger that it should be so treated in equity. There was therefore no necessity for a

suit in equity to reform the same. (Kerr on Frauds and Mistakes, 417, and authorities cited.)

The mortgage conferred upon Allen or the marshal of the Kansas City Court of Common Pleas the power of sale, and upon Allen alone the power to distribute the money; he therefore became and was a trustee, and a purchase made by him at a sale made by the marshal, is voidable and will be set aside upon the application of the mortgagors, and they be allowed to redeem. (NcNees vs. Swaney, 50 Mo., 393; Johnson vs. Bennett, 39 Barb., 237; Voorhies vs. Presbyterian Ch., 8 Barb., 142,) and cases cited. It has been repeatedly held that when there are two or more trustees at a sale made by them, one of the trustees could not buy, even though a fair price was paid for the property. It may even be in excess of its value. (Davone vs. Fanning, 2 John. Ch., 261; Wade vs. Harber, 3 Yerg., 353.) In this case Allen and Hayden, were co-trustees. It is true that either could act. If Allen sold, Hayden had no authority or interest, but if Hayden, the then marshal, sold, Allen still had a duty to perform, coupled with an interest. Hayden under the deed could sell and make a deed that was all. He could not even retain so much money in his hands. (Campbell vs. Johnson, 1 Sandf., 148; Fox vs. McReth, White & Tudor's Leading Cases, vol. 1, top page 172, ed. of 1859, and Am. notes; Armstrong vs. Houston's Heirs, 8 Ohio, 562; Win vs. Dillon, 27 Miss., 494.)

V. There could be no reason for giving the power of sale to the mortgagors, who were the parties of the first part. They already possessed that power, and were fully authorized at any time to sell even before forfeiture. It was their land and they had the lawful right to sell at any time before the sale under the mortgage, and had they done so and paid the debt, then Allen's interest in the land ceased. The court could treat the deed as though it read "party of the second part," without first reforming the mortgage in suit expressly for that purpose. In Kerr on Fraud and Mistake, 417, it is clearly and distinctly stated, that where it is manifest on the face of the deed that a mistake was made, a court of law

would read the deed as though no mistake ever existed, or in other words would correct the mistake and not put the parties to the trouble and expense of a suit in equity to correct the deed. The author refers to a number of authorities to sustain him, and by an examination of these authorities, it will be seen that he is well supported.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs brought their suit in the Circuit Court to set aside a conveyance of real estate made under a power of sale in a mortgage, and praying to be allowed to redeem. On a hearing of the case, the deed of conveyance was set aside and the prayer granted. The plaintiffs are the heirs and representatives of the mortgagors, and it appears that in 1859, the mortgage was made to Horace Allen, one of the defendants, in consideration of a certain obligation made and executed by one of the parties of the first part. The condition in the mortgage was, that if the maker of the note should pay or cause to be paid the note and interest thereon, when the same became due and payable, then the conveyance was to be void, otherwise, it was to remain in full force and effect, and the party of the first part or the marshal of the Kansas City Court of Common Pleas, was empowered to proceed to sell the mortgaged property, or any part thereof, at public vendue to the highest bidder, for cash in hand, after giving thirty days' notice of the time, place and terms of sale. And it was further provided that the said Allen, should, with the proceeds of the sale, pay, first the expenses of the trust, and next, whatever might be in arrear and unpaid on the note, whether of principal, interest or damages, and the remainder, if any, was to be paid to the parties of the first part or their legal representatives.

It appears that defendant Allen, was a resident of the State of Ohio, and that Smith was his agent in Kansas City, that at the request of Smith, Hayden, who was the marshal of the Kansas City Court of Common Pleas, proceeded to execute the power conferred by the mortgage, by selling the land on

the 18th of April, 1862. At the sale, Smith became the purchaser for the sum of $3,600 and received a deed for the land. Smith, by deed dated June 24th, 1862, conveyed to Allen the same land for the recited consideration of $4,300. It is now contended, that neither Allen, the mortgagee, nor Smith his agent, held such relation to the mortgagors, as precluded either from buying at the sale made by Hayden, and that there are only two grounds on which it can be claimed that Allen was forbidden to buy; first, that the mortgage gave him a power to sell, and second, that he was a trustee to dispose of and account for the proceeds of the sale made by Hayden.

The question is now raised, that the mortgage did not give Allen, who was the party of the second part, a power to sell. It is true the deed gives the power to "the said party of the first part" or the marshal of the Kansas City Court of Common Pleas. There was no attempt made to reform the deed on the ground of mistake; but the court below obviously treated the recital "party of the first part" as a mere clerical error, and carried out what was the real intention of the parties. It was unnecessary to give the mortgagors the power to sell, for they already possessed that. All the subsequent recitals of the power given show unmistakeably that Allen, as the party of the second part, was the person to whom the power was given, and he is made the only person to receive and distribute the proceeds arising on a sale, and pay over any surplus that may exist to the mortgagors. The rule of law is that an agreement cannot be varied by external evidence; and that the parties are bound by the document which they have signed and accepted as their agreement, unless there be error on the face of it, so obvious as to leave no doubt of the intention of the parties, without the assistance of external evidence. (Kerr on Fraud and Mistake, p. 417.)

The principle is well illustrated by a case referred to in the King's Bench, decided at an early day. A bond was executed with a condition that the bond was to be void, if a party did not pay a sum of money at a given day. The man who had given the bond, insisted upon a literal performance. He said,

the condition is, "if I do not pay, and I have not paid and therefore, the bond is void." But the court said that it was an obvious error, and therefore that the "not" was to be rejected; and the bond was to be void if the man did pay. (Anonymous in Bach vs. Proctor, 1 Dougl., 384, per Buller J.)

There was no question about going contrary to the intention. It was a question of construction. If such is the rule at law, there can be no question about its being resorted to in a court of equity.

In the present case, the error is on the face of the instrument; it is patent and does not require for its removal the assistance of external evidence. The sale to Smith was really a sale to Allen. The agent for collection possessed the same powers that his principal did. What is done by the agent, is done by the principal. If Allen could not purchase so as to cut off the equity of redemption, neither could Smith acting as his agent do so. It is not pretended that Smith paid any money to the marshal, when the sale was made. He credited the amount on Allen's note. The expenses attending the sale were not paid.

We are now brought to the further inquiry, could Allen by a neglect or refusal to execute the power, and devolving the trust upon marshal Hayden, absolve himself from his character of trustee, so as to acquire the absolute fee by buying in the property? By the terms of the instrument, rightfully interpreted, Allen and Hayden were constituted for the purposes of making the sale, co-trustees, with an alternative power in each, to execute the trust. It is a familiar doctrine that one trustee cannot purchase at a sale, made by his co-trustees. If he does, his purchase may be avoided. Any other rule would lead to connivance and fraud. The mortgagee or trustee, might, when a favorable opportunity presented itself, abrogate his fiduciary character, in behalf of the other person named to sell, and reap an unconscionable advantage.

It might be difficult to prove positive or active fraud, and therefore, the wisest policy is, to stop the temptation by placing upon it a total disability. But it was never intended, that

because Hayden exercised the naked power of sale vested in him, therefore Allen should cease to have any further connection with the trust, and be at liberty to act as any other disinterested person. The deed, after giving either Allen or Hayden the power to sell, provides, not that Hayden should do anything more, but that Allen should, with the proceeds, do what mortgagees or trustees ordinarily do, namely, pay the expenses of the trust, then satisfy the note and interest, and the remainder, if any, pay over to the mortgagors in the deed. It is manifest that he was regarded as the principal trustee throughout, in whom mainly the trust and confidence was reposed, and he cannot therefore be distinguished from the ordinary case of a mortgagee, with power to sell, and as such, clothed with all the rights and disabilities incident to that relation. That when under such circumstances a mortgagee buys in the property at his own sale, the equity of redemption still subsists in the creditor, has long been an established principle in this court. (McNess vs. Swaney, 50 Mo., 388; Reddick vs. Gressman, 49 Mo., 389; Thornton vs. Irwin, 43 Mo., 153; Allen vs. Ransan, 44 Mo., 263.)

Having reached this conclusion it is unnecessary to particularly examine the mass of testimony in reference to the value of the property, and the price at which it was sold. The allegations in the bill, of fraud on the part of Allen, were not sustained, and it was no objection that he selected an unseasonable time, when property was greatly depressed in value, to make the sale. His debt was past due, and he had the right to coerce its payment, provided he resorted to no sinister or undue means. But for the reasons above stated, the sale under the circumstances did not deprive the creditor of the equity of redemption.

The judgment therefore must be affirmed; Judges Napton and Sherwood concur; Judges Vories and Hough not sitting.

STATE OF MISSOURI, Respondent, *vs.* WILLIAM COOK, Appellant.

1. *Practice, criminal—Indictment—Capias, want of—Appearance.*—No capias is necessary for the arrest of a person indicted, if he appears in court, pleads not guilty, gives bond for his appearance, and petitions for a change of venue.
2. *Practice, criminal—Verdict—Weight of evidence—Reversal.*—A verdict, even in a criminal case, will not be disturbed on account of want of evidence, unless there is a total absence of evidence, or it fails so completely to support the verdict, that the necessary inference is that the jury must have acted from prejudice or partiality.

Appeal from Bates Circuit Court.

Page & Holcomb, for Appellant.

In criminal cases the court will reverse the judgment and grant a new trial if the verdict is against the evidence. (State vs. Mansfield, 41 Mo., 470; State vs. Marshall, 47 Mo., 378.)

Attorney General, for Respondent.

This court will not review the facts, after they have been passed upon by a jury under proper instructing and legal testimony, unless the verdict is totally unsupported by evidence. (36 Mo., 143; 28 Mo., 248, 593; 29 Mo., 456; 30 Mo., 262, 498; 36 Mo., 338; 37 Mo., 343; 33 Mo., 260.)

WAGNER, Judge, delivered the opinion of the court.

All the objections, urged for a reversal of the judgment in this case, are technical and devoid of merit.

The indictment was found in the Bates Circuit Court, and charged the defendant with larceny in taking and carrying away certain cattle.

He was convicted, and his punishment assessed at two years imprisonment in the penitentiary. A change of venue was awarded to Cass county, where the trial was had, and it is now urged that the record fails to show that the indictment was found in any court in this State, or by any grand jury, or that the court, in which the indictment was alleged to have been found, was in session at the time.

But this point cannot be sustained. The record shows, that at the July term, 1873, of the Bates Circuit Court, a grand jury was impaneled, sworn and charged, which found the indictment against the defendant and returned it into court. The record states the existence of all the essential and necessary facts, and whatever minor details may have been left out are abundantly cured by our statute in reference to criminal practice. (Wagn. Stat., 1090, § 27.) There is nothing in the objection, that it is not shown that the indictment was filed in the Bates county Circuit Court, and that it was not certified by the clerk of that court to Cass county.

It appears that the grand jury returned into court, and presented, the indictment as a true bill, and the clerk expressly certifies that the record transmitted constitutes a full, complete and true transcript of the proceedings had, and made a record in the cause, together with the original papers filed therein, not forming a part of the record. This certificate is sufficient. It is evident that the indictment was sent to the court where the trial was had, and it is difficult to perceive how the defendant was prejudiced by the want of explicitness on the part of the clerk as to whether he sent the original, or certified a copy of the indictment. It is again insisted, that it does not appear that any *capias* was ever issued for the defendant, or that he ever appeared in the court, except by attorney. Both of these objections are however unavailing, and the latter is expressly negatived by the record.

It is shown that at the time the indictment was returned the defendant was in court, and pleaded not guilty; he then gave a bond for his appearance, and petitioned for a change of venue, which was awarded in accordance with his application. Under these circumstances, no *capias* for his arrest was necessary. It would have been an idle and unmeaning ceremony. When the trial took place the record expressly states, that the defendant was present in proper person.

There is no merit in the point raised, that the verdict was bad, because it did not specify the degree of offense of which the defendant was found guilty. The indictment contains but

one count, and that charged the defendant with the commission of the crime of grand larceny. The jury found him guilty, and fixed his punishment at two years in the penitentiary. The verdict was strictly responsive to the charge in the indictment. It found the defendant guilty, and sentenced him to a term prescribed in the statute as a punishment for his offense.

It is contended that the evidence did not warrant the verdict, but we cannot reverse the case on that ground. There was evidence from which the jury might have found their verdict, and consequently we will not interfere.

It is only where there is a total absence of evidence, or it fails so completely to support the verdict, that the necessary inference is, that the jury must have acted from prejudice or partiality, that we will attempt to relieve for that reason, even in a criminal case.

The cattle were alleged to have been stolen in Bates county, and they were traced to defendant's possession in the adjoining State of Kansas.

The court, at the instance of the State, gave but one instruction, and that was to the effect, that, if the jury believed from the evidence that the defendant did feloniously steal, take and carry or drive away the cattle mentioned in the indictment, or any one of them, in Bates county, and that the same was the property of Lewis Smallwood, they should find him guilty, and assess his punishment in the penitentiary for a term not less than two, nor more than five years.

For the defendant the court instructed the jury, that unless they found from the evidence that the offense charged in the indictment was committed in the county of Bates, and State of Missouri, they should find for the defendant, though it might appear that defendant was seen with the cattle in the State of Kansas.

Defendant asked for another instruction, which virtually took the case from the jury by declaring, that there was no evidence that proved or tended to prove that defendant stole the cattle in Bates county, and the jury should therefore acquit.

This instruction was refused and rightfully. Venue is a matter which is to be proved like any other fact, and there were circumstances given in evidence from which the jury might justly have inferred, or deduced, the fact that the crime was committed in this State.

The instructions given on both sides are entirely unobjectionable and are to be commended for succinctly confining themselves to the real issue in the case.

Upon the whole the accused seems to have had a fair trial, and we have been wholly unable to find anything which would justify us in disturbing the verdict.

The judgment is affirmed; the other judges concur except Judge Vories, who is absent.

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GEORGE W. COSTER, Appellant, *vs.* PETER MESNER, *et al.*, Respondents.

1. *Bills and Notes—Extension of time of payment—Sureties—Interest in advance.*—A promise of extension of time upon a note, in order to discharge a surety, must be such as will prevent the holder from bringing an action against the principal. The taking of interest in advance will not constitute such a promise. (Hosea vs. Rowley, 57 Mo., 357.)

Appeal from Jasper Circuit Court.

Johnson & Botsford, for Appellant.

I. The receipt of a sum of money, in payment of the interest on the note to a future day, did not, without reference to, or against, the express intention of the parties, constitute, in law, a contract to extend the time of payment. (Freeman's Bank vs. Rollins, 13 Me., 202; Mariners' Bank vs. Abbott, 28 Me., 280; Oxford Bank vs. Lewis, 8 Pick., 458; Blackstone Bank vs. Hill, 10 Pick., 129; Central Bank vs. Willard, 17 Pick., 150; 1 Par. Notes and Bills, 241.)

W. H. Phelps, for Respondents.

I. The receipt of interest in advance after maturity is sufficient consideration to discharge a surety, and is an extension of time. (1 Par. Bills and Notes, 240; N. H. Sav. Bank vs. Colcord, 15 N. H., 119; Chute vs. Pattee, 37 Me., 102.)

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced by plaintiff against defendants, Mesner, Motherspaw & Gates, upon a promissory note. Mesner failed to appear, and judgment was rendered against him by default. Motherspaw and Gates filed their answer, stating that they signed the note as security for their co-defendant, Mesner, which plaintiff well knew at the time he took the note; that after the note became due, the plaintiff, in consideration of forty dollars to him paid by Mesner, the principal, extended the time of payment thereof without the knowledge or consent of the securities. The replication did not deny that Motherspaw and Gates were sureties, but it denied extending the time of payment.

Upon the trial the evidence showed, that on the 10th day of August, 1872, after the note was due, Mesner paid forty dollars on the same, and that the plaintiff with that money extinguished the accrued interest, and applied the balance in payment of the interest up to the 20th day of September following. There was no evidence to establish any agreement in reference to an extension of time. The court then at the instance of the defendants instructed the jury, that, if defendant, Peter Mesner, on the 10th day of August, 1872, paid plaintiff on said note a sum of money, which plaintiff received on said note as the full payment of the interest on said note to the 20th day of September, 1872, without the knowledge or consent of defendants Motherspaw and Gates, they will find the issue for the defendants.

The following instruction was asked for by the plaintiff, which the court refused: "If the jury should find, that, after the note became due, the interest thereon was paid by Mesner to a time ahead, yet unless the jury should further find

that plaintiff for a valuable consideration, and without the knowledge or consent of Motherspaw and Gates, agreed to extend the time of payment after the note became due, then and in that event they will find the issue for the plaintiff." There was a verdict and judgment for defendants, and plaintiff appealed.

It is very clear that the instruction given for defendants should have been refused, and that the instruction asked by the plaintiff should have been given. The established doctrine in this court is, that a promise of extension of time upon a note, in order to discharge a surety thereon, must be such as will prevent the holder from bringing an action against the principal, and the taking of interest in advance will not constitute such a promise.

This very question was recently decided in the case of Hosea vs. Rowley, (57 Mo., 357,) upon the full consideration of the authorities, and it is unnecessary to repeat what was there said, or to re-examine the reasons upon which that decision was based.

The judgment will be reversed and the cause remanded; the other judges concur except Judge Vories, who is absent.

WILLIAM L. DURRETT, Plaintiff in Error, *vs.* WILLIAM PIPER, Defendant in Error.

1. *Covenant—Incumbrances—Dower.*—An inchoate right of dower constitutes an incumbrance within the meaning of a covenant against incumbrances.
2. *Dower—Husband living—Release—Grant—Assignment.*—A wife's dower interest during the life of the husband is a mere possibility, which may be released, but cannot be the subject of grant or assignment.
3. *Dower—Articles of separation—Covenant of indemnity.*—In articles of separation, A. covenanted to indemnify B. against the claims of B.'s wife for alimony and dower. B. afterwards, to procure his wife's signature to a deed of land, was compelled to pay her money. *Held*, that B. had no claim against A. on this account.

Appeal from Saline Circuit Court.

Draffen & Williams, for Plaintiff in Error.

I. An inchoate right of dower is an incumbrance amounting to a breach of the covenant against incumbrances. (Rawle on Cov. for Tit., 123; 2 Scrib. on Dow., 3, 4; Shearer vs. Ranger, 22 Pick., 447.)

Shackelford & Strother, with Turner & Cupples, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff instituted suit against the defendant, alleging in his petition, that, being about to separate from his wife and wishing to provide for her support, he entered into a written agreement with his said wife and the defendant, who was her son-in-law, whereby he conveyed to defendant in trust, for the use of his wife, nineteen hundred and fifty-four dollars and seven cents in cash, together with certain other specified articles of house-hold goods; that defendant accepted the trust, and in consideration of the premises, covenanted to indemnify the plaintiff against all debts and contracts that his wife should thereafter make, "as well as against her claim of alimony, and dower in the lands and estate of the plaintiff." As a breach of this covenant it was alleged, that defendant failed to indemnify plaintiff against the wife's claim of dower in plaintiff's real estate; that plaintiff, after the agreement, sold certain lands to one Tyler, binding himself to make a good title, and delivered to him a deed executed by himself alone; that Tyler afterwards, learning that plaintiff's wife was entitled to dower in the land, refused to complete the contract, unless plaintiff's wife would relinquish her right of dower, and threatened to sue plaintiff for damages; that the wife refused to make such relinquishment, and to obtain the same plaintiff had to pay and did pay her the sum of one thousand dollars.

The answer admitted the agreement, and put in issue all the other allegations in the petition. It denied that defendant

had failed to perform his covenants, and averred that he had always been and still was ready and willing to give plaintiff any indemnity against the alleged claim of dower, that might lawfully be required of him, but that the said wife had departed this life, in the life-time of plaintiff, without ever setting up or in fact having any claim of dower in the land, and that no such right of dower could ever arise, and that defendant could not be rightfully required to give any further indemnity.

The case was submitted to the court without the intervention of a jury, and the evidence tended to show that plaintiff sold the land to Tyler, who at the time of the purchase received a general warranty deed, executed by the plaintiff alone, paid part of the purchase money and secured the payment of the balance by a deed of trust. That nearly a year afterwards Tyler, for the first time, learned that plaintiff had a wife, who was entitled to dower, and went to see him on the subject, and insisted that he should either make the title right or take back the land. On consultation with the wife, she made no claim to dower, but refused to sign any instrument of relinquishment, on the ground that plaintiff owed her fifteen hundred dollars on account of interest, and that she had been advised by her agent, who formerly managed her property, not to sign or acknowledge any deed till the indebtedness was paid. An understanding was finally arrived at, by which plaintiff paid her one thousand dollars, and then she signed a deed duly relinquishing her right of dower. In about a month after this she died. The court found for the defendant.

It is unnecessary to enter upon a critical examination of the instructions. The declarations asked by the plaintiff were refused, and they were based upon the hypothesis that the facts disclosed by the pleadings and evidence constituted a breach of the defendant's covenant, and rendered him liable for the amount plaintiff paid to obtain the relinquishment. The converse of this proposition was assumed by the defendant's declarations which were given.

Whether the defendant is liable in this proceeding must depend upon the construction given to the covenant contained in the deed of separation. By the deed the defendant "covenants to, and with, and binds himself, his heirs, executors, and administrators to, the said William L. Durrett (plaintiff), to indemnify him, his heirs, executors, and administrators against all debts and contracts the said Mrs. Magdaline Durrett may make after this date, as well as her claim of alimony and dower."

Although formerly doubted, the later decisions seem to have established the principle, that an inchoate or contingent right of dower constitutes an incumbrance within the meaning of a covenant against incumbrances. But the covenant of the defendant in this case was not against incumbrances arising out of an expectant estate; nor was it a covenant that Mrs. Durrett should, at the request of the plaintiff, join in any instrument to accomplish the relinquishment of her dower.

It indemnified the plaintiff against any injury arising out of a claim of dower on the part of the wife, and that was all. A dower interest upon the part of the wife, whilst the husband is living, is an inchoate and contingent right. Its value depends wholly upon the death of the husband. If he survives his wife, she has no right which is transmissible; so long as the husband shall live it is only a right in legal contemplation, and being contingent it may never become vested.

It is a mere possibility which may be released, but cannot be the subject of grant, or assignment. The covenant being for an indemnity, against the claim of dower, it is obvious that no breach could happen till the contingency arose, which would legally vest in the wife a valid or substantial claim.

This could only be the case in the event that she survived her husband. As long as the husband lived, her estate was simply in contemplation or expectancy.

Had the husband died, whilst the wife was living, and during widowhood she had claimed and obtained dower, then there would have been a breach, for which the defendant would have been responsible. But as she preceded him in

death, no valid claim could arise. It is immaterial that she refused to relinquish, to enable the husband to make a good title upon a sale of the land; there was no agreement that she should do so.

Nor does it make any difference what her motive was for refusing, whether to coerce the payment of a debt which she claimed or not. It is a sufficient answer to say that the deed imposed on her no obligation to release her right.

Had the plaintiff contemplated selling at the time the deed was executed, he might have guarded against the predicament in which he subsequently found himself placed, but he did not do so, and he is now remediless.

The judgment should be affirmed; the other judges concur except Judge Vories, who is absent.

WILLIAM JAMES, *et al.*, Plaintiffs in Error, *vs.* E. W. BISHOP, *et al.*, Defendants in Error.

1. Dismissed, no assignment of errors nor brief being filed.

Error to Phelps Circuit Court.

Ewing & Smith, for Plaintiffs in Error.

C. C. Bland, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

No assignment of errors or brief having been filed in this case, the writ of error is dismissed; Judge Vories absent, the other judges concur.

STATE OF MISSOURI, Respondent, *vs.* THOMAS PITTS, Appellant.

1. *Practice, criminal—Indictment—Counts—Election.*—The defendant has no right upon a trial under an indictment containing several counts to compel the State to elect under which count she will proceed at the trial. (State vs. Porter, 26 Mo., 201.)
2. *Practice, criminal—County Court—Summoning regular panel of jurors.*—The act (Sess. Acts, 1873, p. 76) requiring the County Court to summon the regular panel of jurors thirty days before the term of the Circuit Court, is merely directory.
3. *Crimes—Effect—Animus.*—In criminal cases, the question is not as to the effect of the act done, but as to the *animus*.
4. *Crimes—Drunkenness.*—Drunkenness is no excuse for crime.
5. *Practice, criminal—Trials—Indictment—Counts—General finding.*—When an indictment contains several counts, all relating to the same transaction, and are framed on different sections of the statute to meet the exigencies of the trial, a general finding, which does not exceed in the punishment, which it assesses, the maximum of that assessed in any section on which any count is based, is permissible.

Appeal from Polk Circuit Court.

W. P. Johnson, for Appellant.

John A. Hockaday, Att'y Gen'l, for Respondent.

I. The State was not bound to elect, on which count it would proceed to trial. (State vs. Porter, 26 Mo., 201.)

II. Drunkenness is an aggravation of a crime rather than a mitigation. (14 Mo., 502; 21 Mo., 466; 27 Mo., 332.)

III. It was not necessary for the verdict to show upon which count the defendant was found guilty, a general verdict is good. (State vs. McCue, 39 Mo., 112.)

SHERWOOD, Judge, delivered the opinion of the cour

The defendant was indicted in the Hickory Circuit Court. The indictment contained three counts which were based, respectively, on the 29th, 32nd and 33rd sections of Wagn. Stat., ch. 42, pp. 449, 450. On his application, the venue was changed to Polk County, where, upon a trial had, he was duly convicted, and his punishment assessed at two years in the penitentiary. For a reversal of the judgment, there have been assigned various errors which will be briefly noticed. The record in this case sufficiently discloses, that

the indictment was "found and presented in open court." The defendant not being in custody, or held on recognizance, the clerk was expressly prohibited by law (Wagn. Stat., 1086, § 1) from making any entry on the minutes or records of the court in reference thereto. The clerk therefore could only indorse the date of its filing on the indictment in the ordinary and usual way, and refer to it in the transcript as one of the indictments found and presented at that term by the grand jury.

Although the opening order of the Hickory Circuit Court does not show that the Hon. B. H. Emerson was judge of the court, yet it shows his presence together with that of the other officers of the court, and a subsequent entry, made prior to the removal of the cause, shows with distinctness that he was judge of that court. The record shows also, that the defendant was duly arraigned, and pleaded not guilty in the Polk Circuit Court, prior to the impaneling of the jury. This is shown by the judgment of conviction, so that the objection, on the score of there being no arraignment of the accused, is not true in point of fact.

The defendant had no "right secured to him by the law" to compel the State to elect, upon which count of the indictment, she would proceed at the trial. (State vs. Porter, 26 Mo., 201.)

There was no error in overruling the motion of defendant to have the jury impaneled from the regular panel of jurors, which had been summoned for the term under the provisions of the act concerning jurors. (Sess. Acts, 1873, p. 46.) A portion of the regular panel were then sitting as a jury in the trial of another cause, and it was perfectly competent after exhausting the remainder of the regular panel, for the court to order the jury to be completed from the by-standers, under the terms of section six of the act referred to. And it was a matter of no moment, that the regular panel for the term was not selected by the County Court at least thirty days prior to the commencement of the term at which the prisoner was tried, in accordance with the above mentioned act. That

act can only be regarded as merely directory. To rule that it is mandatory, would be to hold, that, if by any accident the County Court should not meet and select jurors in the time and manner provided by the act, the wheels of justice would have to stand still, and the Circuit Court be prevented from transacting its duties respecting crimes and criminals, simply because the County Court failed to discharge its duty. No such ruling will be made.

The evidence in the case, which fully sustains the verdict of the jury, shows an aggravated assault with a pistol; and the court very properly refused the admission of evidence to show that the defendant "apologized the next morning." Offenses against the law cannot be wiped out, or atoned for, by apologies.

The instructions, given in behalf of both the State and the defendant, presented the law applicable to the facts proven with the most unexceptionable fairness. The first instruction asked by defendant was correctly refused, because it in effect asserted the principle, that, although defendant had made a felonious assault, yet, unless he thereby endangered the life of his uncle, he ought to be acquitted.

The question in such cases is not as to the effect of the act done, but as to the *animus* which prompted its commission. Drunkenness is no excuse for crime, so that even if there had been any evidence on which to base the fifth instruction asked by defendant, it was properly refused, as it enunciated a doctrine always repudiated by the courts.

But one point remains to be considered; and that is as to whether a general finding of guilty, where an indictment contains three counts, will support a judgment. In reference to this, it may be observed, that where, as in the case at bar, the several counts relate to the same transaction, and are framed on different sections of the statute to meet the exigencies occurring at the trial, that then a general finding, which does not exceed, in the punishment which it assesses, the maximum of that specified in any section on which any count is based, will be permissible, and afford no ground for arrest-

ing the judgment based thereon. Here, the gravamen of the offense charged in all the counts is the felonious assault; the counts are therefore not repugnant, but of a kindred nature; bringing this case within the line of decisions heretofore made in this State. (State vs. Jennings, 18 Mo., 435; State vs. Bean, 21 Mo., 267; State vs. McCue, 39 Mo., 112.)

In conclusion, the trial court ruled correctly on every point presented by the record, and its judgment is accordingly affirmed; Judge Vories absent; the other judges concur.

NANCY JONES, *et al.*, Defendants in Error, *vs.* WILLIAM MANLY, *et al.*, Plaintiffs in Error.

1. *Practice, civil—Motions—Bill of exceptions—Equitable defense—New trial, motion for.*—The motion to strike out an equitable defense and the action of the court thereon, being preserved by the bill of exceptions, there is no necessity for referring to it in a motion for a new trial.
2. *Evidence—Ejectment—Waste.*—In an action of ejectment evidence of waste is admissible. (Wagn. Stat., 560, § 13.) [Lee v. Bowman, 55 Mo., 400.]
3. *Ejectment—Mansion house of deceased, possession by wife—Dower—Assignment.*—In an action of ejectment for land whereon the mansion house of the deceased is situated, the widow, to whom dower has not been assigned, has such a possessory right as will defeat the action and her right is capable of being assigned, and when assigned carries with it all the incidents belonging to it prior to its transfer.
4. *Administrator's sales—Approval by court—Record.*—Regularly the approval by the court of the report of an administrator's sale ought perhaps to be entered of record, but if no formal entry is found reciting this, it does not follow that the sale is void and liable to be overthrown in a collateral proceeding.
5. *Sales, judicial—Irregularities—Formalities.*—It is the policy of the law to uphold judicial sales and to look with leniency on minor irregularities, which do not affect nor prevent a substantial compliance with those formalities which it is always best and safest to strictly observe.
6. Valle's Heirs vs. Fleming's Heirs, 29 Mo., 152, and Shroyer vs. Nickell, 55 Mo., 264, affirmed.

Error to Cedar Circuit Court.

Johnson & Buller, for Plaintiff in Error.

1. That portion of the amended answer of the defendant, Thomas Jones, which set up the purchase of the land by him, the payment of the debts of the estate with this money, and the value of the permanent improvements made by him on the land in good faith, and claiming a lien on the land therefor, was an equitable defense. (Valle's Heirs vs. Fleming's Heirs, 29 Mo., 152; Hudgins vs. Hudgins, 6 Gratt., 320; McLaughlin vs. Daniel, 8 Dana, [Ky.] 182; Cornwall vs. Cornwall, 6 Bush, [Ky.] 367; 4 Bush., 777; Howard vs. North, 5 Tex., 351; Stone vs. Daniel, 25 Tex., 430; Townsend vs. Smith, 20 Tex., 465; McLead vs. Johnson, 28 Miss., 374; Baldwin vs. Jenkins, 23 Miss., 207; Bentley vs. Long, 1 Stroth. Eq., [S. C.] 43; 14 La., 552; Dufour vs. Compane, 11 Martin, La., 615; Moody vs. Moody, 11 Me., 247; Hoard vs. Hoard, 41 Ala., 602; Petty vs. Clark, 5 Pet., 482; Bright vs. Boyd, 1 Sto., 478; 2 Sto., 607; Reed vs. Taylor, 56 Ill., 288; Rex vs. Cracroft, McClell & Y., 460; 2 Harr. Dig., 3038; Muir vs. Daggett, 3 Blackf., 293; 7 Blackf., 268; 9 Ind., 1; 24 Ind., 264; Ritter vs. Henshaw, 7 Ia., 97; McLane vs. Martin, 45 Mo., 393; Heath vs. Daggett, 21 Mo., 69; Maguire vs. Marks, 28 Mo., 193; Wagn. Stat., 1206, § 219.)

II. That part of the answer which was stricken out, being part of the record, and the action of the court thereon having been duly excepted to, it did not require to be again called to the attention of the court by the motion for a new trial. (Bateson vs. Clark, 37 Mo., 31; Brady vs. Connelly, 52 Mo., 19; Tanner vs. Morrow, 52 Mo., 118; State vs. Matson, 38 Mo., 489.)

III. The recital in the deed that the sale was made on the 4th day of January, 1867, and the land appraised March 2d, thereafter, did not make it void on its face. The sale was reported March 13th. The object of the appraisement is to inform the court as to the value of the property before it is called upon to approve or disapprove the sale. (Beal vs. Harmon, 38 Mo., 435.) The spirit of the law, if not its letter,

was complied with, and that was sufficient. (McVey vs. McVey, 51 Mo., 406; Lessee of Allen vs. North, 3 Ohio, 526.)

IV. The court erred in excluding the deed, because the record did not show in direct terms that there was any order of approval of the sale. (Wagn. Stat., 98, §§ 34, 35.) The approval may be inferred from circumstances. Moreover the recitals in the deed are *prima facie* evidence of the approval. (Wagn. Stat., 98, § 37.) The first declaration of law asked for by the defendants ought therefore to have been given. (Valle vs. Fleming, 19 Mo., 454, Grignon's Lessee vs. Astor, 2 How., 319; Snyder vs. Market, 8 Watts, 416.)

V. The evidence concerning the cutting of timber was inadmissible. The petition does not charge waste. (1 Greenl. Ev., § 50.)

VI. The deed from Lydia Jones, widow of F. C. Jones, deceased, to Thomas Jones, ought to have been admitted in evidence. She had a right to retain the possession of the premises until dower was assigned to her, and the deed operated as a valid assignment of that right. (Stokes vs. McAllister, 2 Mo., 132; Gourly vs. Kinley, 66 Penn., 270.)

VII. The cases of Maguire vs. Riggin, 44 Mo., 512; Waller vs. Mardus, 29 Mo., 25, and cases cited by the plaintiff, only show that the inchoate right of dower of a married woman, in the land of her husband before his death, is not assignable.

D. P. Stratton with W. D. Hoff, for Respondents.

I. Administrator's sales are judicial sales. (Rorer's Jud. Sales, 6, § 10.) The rule of *caveat emptor* applies in all its vigor to judicial sales. (The *Monte Allegre*, 9 Wheat., 616; Puck vs. U. S., 4 Am. Law Reg., 459, 460; Bank vs. Ammon, 37 Penn. St., 172; Rorer Jud. Sales, 168, and cases there cited; Newler vs. Cait, 1 Ham. O., 519; Mockbee vs. Gardner, 2 Harr & G., [Va.] 176; Broom's Leg. Max., 739; Coke on Lit., 102*a*; 41 Mo., 289.)

II. The decision in Valle Heirs vs. Fleming Heirs, (27 Mo., 152) stands alone, is unaffirmed, and is contrary to the gen-

eral run of authority; but admitting it to be good law, it is not in point. In that case the debt paid with purchase money was secured by mortgage, and a lien on the land created by the voluntary act of the ancestor. The lien, if any, in this case is but an involuntary conditional statutory lien, which cannot be subrogated or substituted by the voluntary act of defendant.

III. Defendant has his action under the statute for value of improvements. Where there is an adequate remedy at law, equity cannot be invoked.

IV. The ruling of the Circuit Court, sustaining motion to strike out, should not be disturbed by this court, as no opportunity was given the judge below to correct his own error, if error there was, the attention of the court not having been called thereto in the motion for new trial. (Margrove vs. Asimus, 51 Mo., 558; Lexton vs. Allen, 49 Mo., 417.)

V. Administrator's sale to be of any validity must be approved by the Probate Court, and it must appear of record that such sale was approved and the statute substantially complied with. (Valle vs. Fleming, 19 Mo., 454; Jarvis vs. Russick, 12 Mo., 64; Speck vs. Wohlien, 22 Mo., 310; Strouse vs. Drennan, 41 Mo., 289.)

An approval of the sale cannot be presumed from the naked certificate of acknowledgment reciting that it was made in open court, there being no notice of the fact on the record. The court can only speak by its record.

VI. The appraisement having been made some time after the date of the sale, the deed of the administrator should have been excluded. (R. C. 1865, p. 408, § 28.)

VII. A dowéress, until her dower is set off, has no property in the land which is subject of grant or assignment. (Maguire vs. Riggin, 44 Mo., 512, and cases cited; Waller vs. Mardus, 29 Mo., 25; 1 Washb. Real Prop., 2 Ed., 253.)

Sherwood, Judge, delivered the opinion of the court.

Ejectment for land in Cedar county. The plaintiffs, who are the minor heirs of Ferdinand C. Jones, deceased, sue by

their guardian, Lydia Jones, the widow and relict of the decedent, who died seized and possessed of the land in controversy, and was indebted also in a considerable sum. In consequence of such indebtedness the land was sold at administrator's sale, at which defendant, Thomas Jones, became the purchaser, paid the purchase money, and received a deed from the administrator on the 13th day of March, 1867.

The answer of the defendant, Manly, the tenant of defendant Jones, was a general denial; that of Jones himself was a general denial, and also contained an equitable defense, similar to that set up in Valle's Heirs vs. Fleming's Heirs, (29 Mo., 152.) This equitable defense was stricken out on motion, and in this there was error.

The doctrine, asserted in the case just cited, may well be regarded as settled in this court, and has in a recent case (Shroyer vs. Nickell, 55 Mo., 264) received our entire and cordial approval; and there is nothing in this case to distinguish it in point of principle from that of Valle's Heirs vs. Fleming's Heirs, *supra*, as it is wholly immaterial whether the lien on the real estate of the decedent be created during his life time by deed or by the operation of the statute, which creates an incumbrance on the land of the deceased to secure the creditors of the estate. And the motion to strike out the equitable defense, as well as the action of the court thereon, having been preserved in the bill of exceptions, it occupied the same footing as a demurrer, and there was no manner of necessity for referring to it in the motion for a new trial. (Bateson vs. Clark, 37 Mo., 31; State vs. Matson, 38 Mo., 489; Brady vs. Connelly, 52 Mo., 19; Tower vs. Moore, *Id.*, 118.)

On the theory on which this cause was tried in the court below, there was no error in admitting evidence touching waste, as the statute respecting actions of ejectment annexes a recovery for waste and injury as incidental to a judgment in favor of plaintiffs. (Wagn. Stat., 560, § 13; Lee vs. Bowman, 55 Mo., 400.)

As the mansion house of the deceased was on the premises in question, and as the dower of the widow had not been assigned, she had such a possessory right as would defeat an action of ejectment, and this right was capable of assignment, and when assigned carried with it all the incidents belonging to it prior to its transfer. (Stokes vs. McAllister, 2 Mo., 163; Kane vs. McCowan, 55 Mo., 181; Wagn. Stat., 542, §§ 21, 22.) The exclusion, therefore, of the deed of the widow to the defendant, Jones, was erroneous. And there was also error in excluding the deed of the administrator. This deed contained all the usual and statutory recitals in regular order, and was made at the proper term.

I attach no importance to the fact that the deed recites that the sale took place on the 4th day of January, 1867, and the appraisement on the 2d day of March next thereafter, because the deed expressly recites that the appraisement occurred prior to the sale. It may, in consequence, well be assumed that the date referred to was a mere clerical mistake.

Regularly, the approval by the court of the report of sale by the administrator ought perhaps to be entered of record. But it does not necessarily follow, that if no formal entry is found reciting this, that therefore the sale is void and liable to overthrow in a collateral proceeding. For aught that appears in the bill of exceptions to the contrary, the report of the administrator is among the files of the Cedar Probate Court, with the approval of the judge and the date of such approval indorsed thereon. But one thing is quite clear, although the plaintiffs in their researches for record entries failed to find any expressly approving the sale, yet it was ascertained that the records did show this, that on the very day the deed was made the administrator appeared, and on his application and representation that an error had occurred in the description of one forty of the land sold, that the court ordered the error in description to be corrected.

Besides this, the deed contained all the recitals requisite in such cases, was acknowledged before the probate judge himself, who was *ex officio* clerk, in open court. Under such

circumstances it would be going a great way to hold that the sale had not been approved by the court.

It is the policy of the law to uphold judicial sales, and to look with leniency on minor irregularities, which do not affect nor prevent a substantial compliance with those formalities which it is always best and safest to strictly observe.

Holding these views, the judgment must be reversed and the cause remanded. Judge Vories did not sit; the other judges concur.

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ROBT. A. BLACK, Plaintiff in Error, *vs.* JACOB GREGG, *et al.*, Defendants in Error.

1. *Deed of trust—Acknowledgment before trustee—Deed as inter partes.*—Although the acknowledgment of a deed of trust, taken before one who is trustee in the instrument, is worthless, yet the deed is valid between the parties.
2. *Deed, acknowledgment of—Registration—Notice, etc.*—The acknowledgment of a deed becomes necessary, principally in order to obtain registration, for the purpose of imparting notice to third parties.

PER CURIAM—NAPTON & HOUGH, J. J., DISSENTING.

3. *Deed of trust, sale of land under, while maker was in Southern army—Bill to set aside, etc.*—A bill in equity will not lie to redeem lands sold under a deed of trust, on the ground that the maker was, when the land was sold, in the so-called Confederate service, and held as a prisoner by the United States Government, where it further appears that he had voluntarily entered the Southern army. (DeJarnette vs. DeGiverville, 56 Mo., 440, affirmed.)

Error to Jackson Circuit Court.

Kinley & Kinley, for Plaintiff in Error.

Sheley & Woodson, for Defendants in Error, cited DeJarnette vs. DeGiverville, (56 Mo., 440).

SHERWOOD, Judge, delivered the opinion of the court.

Black, the plaintiff, instituted this proceeding to redeem certain lands in Jackson County, sold at a trustee's sale. The case was submitted upon the following agreed statement of

facts: "That in order to secure J. M. Hughes & Jacob Gregg in certain indebtedness of R. A. Black, Black, in 1862, made a deed of trust with power of sale, conveying to Lucas, as trustee, certain lands in the petition described, and also, one portable saw-mill; that the deed of trust was acknowledged before said Lucas, as the clerk of the Circuit Court; that said deed was made for the benefit of J. M. Hughes & Jacob Gregg; that Black failed to pay off the debts in said deed specified; that Lucas, on the 13th day of May, 1865, sold all the property, both real and personal, described in the deed, when Wm. Chrissman, as the agent of Hughes & Gregg, purchased all the property, obtained a deed therefor, and afterwards conveyed the same to Hughes & Gregg. It is admitted, that on the day of sale, and during publication, Black was a prisoner, in the custody of the United States' authorities; that he had voluntarily entered the service of the so-called Confederate States of America, and was taken prisoner while in such service. It is admitted that the sale in all things was in conformity to the deed of trust. A copy of deed of trust attached, to show particulars in deed. No fraud charged."

Upon this agreed statement, the court found for defendants, and dismissed the petition; and this ruling is assigned for error.

Although the acknowledgment was worthless, (Stephens vs. Hampton, 46 Mo., 404; Dail vs. Moore, 51 Mo., 589,) yet the deed was valid between the parties, and the agreed statement admits its execution. The chief object of a certificate of acknowledgment, is, in order to admit the deed to registry. It is only where the rights of third persons intervene—*i. e.* purchasers etc. for a valuable consideration without actual notice—that recording a deed or other instrument becomes necessary; and under our statute, the due acknowledgment of the instrument, evidenced by a proper certificate thereof, is a condition precedent to registration.

As to the other point involved in the record, I shall content myself by merely referring to the recent case of DeJar-

nette vs. DeGiverville, (56 Mo., 440,) where the whole subject is elaborately and exhaustively considered; as I am unable to add anything to the conclusive force and clearness which characterizes the reasoning of the opinion concurred in by a majority of the members of this court.

For these reasons it only remains to affirm the judgment of the court below. All the judges concur, except Judge Napton, who dissents.

Hough, Judge, delivered a separate opinion.

I concur in affirming the judgment in this case, but do not wish to be understood as yielding assent to the views entertained by the majority of the court in the case of DeJarnette vs. DeGiverville, (56 Mo., 440). Nor do I conceive that the questions discussed and decided there, arise in this case, as it does not even appear from the agreed statement, where Black and Hughes & Gregg were domiciled at the time of the execution of the trust deed, or at the maturity of the notes secured thereby.

Napton, Judge, delivered the dissenting opinion.

I dissent from the opinion of the court in this case.

Andrew Gantner, Respondent, *vs.* F. T. Kemper, *et al.*, Appellants.

1. *Mechanic's lien—Indiscriminate payments, when discharge the lien.*—In suit on a mechanic's lien, when it appears that the contractor was indebted to plaintiff on buildings other than the one described in the petition, and that payments were made on the general account and not on that of any particular building, the lien is not thereby discharged, unless the payments are sufficient to discharge all the debts. The effect of such payments would depend upon the application made by the contractor, at the time of payment, or in default of such application then upon that made by plaintiff at that time; or if no application were made by either, then the law would apply the payments as justice and equity might require.

Appeal from Cooper Circuit Court.

Draffin & Williams, for Appellants.

McMillan & Brothers, for Respondent.

Hough, Judge, delivered the opinion of the court.

This was an action under the statute in relation to mechanics' liens, brought by the respondent against F. T. Kemper, the owner of the premises sought to be charged with the lien, and Marcus Williams, the contractor, for work and labor done and materials furnished by him, in the erection of an addition to the dwelling house of said Kemper the sum claimed to be due being a balance of six hundred and eighty-two dollars.

Both defendants appeared and filed answers. The only defense insisted on at the trial was payment. There was a verdict and judgment for the plaintiff for the sum claimed and for the enforcement of the lien, from which defendants have appealed to this court.

It appears from the evidence that at the time plaintiff was engaged in building the Kemper house, the defendant, Williams, was indebted to him for work and labor done and materials furnished, for other houses finished or in course of erection. The payments pleaded by Williams in bar of plaintiff's action, are shown to have been made by him on general account, and not for or on account of any particular building. Plaintiff testified that these payments were by him, at the time they were made, applied to other claims for work and labor and materials, than the one in controversy.

During the progress of the trial defendant's counsel offered to prove by the defendant, Williams, that in the month of August, 1872, he did not owe the plaintiff anything on the Pigott or Trigg buildings. The court refused to admit the testimony, but ruled that defendant's counsel might ask generally, whether anything was due on the general account; to which ruling defendants excepted and assign this action of the court for error.

How many buildings there were in August, 1872, on account of which it was claimed that Williams, the contractor, was indebted to the plaintiff, does not appear from the record; and it is difficult to see how defendant's counsel expected to benefit their clients by this evidence, when Williams' own testimony shows conclusively that he never paid any sum whatever, on account of any particular building. We think, however, the testimony was competent, although it would have involved the defendant, Williams, in a contradiction, except upon the theory that he did not, at that time, owe the plaintiff anything on account of any building, except the Kemper building, and to this he had previously testified. He had also testified that he did not know whether he owed anything on Trigg's building in August, and subsequently swore that at the time of trial he did not owe the plaintiff one cent for any work done on any building. We do not think this error sufficient to warrant us in reversing the judgment, as it is plain that the defendants could not have been injured by it. The same testimony, from the same witness, was in substance already before the jury.

Error is further assigned on the refusal of the court to give the following instruction, asked by the defendants: "The jury are instructed in this case, that if they find from the evidence that there was a running account between plaintiff and the defendant, Williams, with debits and credits for work and labor done and materials furnished on the house and building mentioned in the petition, as well as for labor done and performed and materials furnished for other parties on other houses, and that the defendant, Williams, was in the habit, from time to time, of making payments to plaintiff promiscuously for said work and labor and materials so done and furnished, then the plaintiff has no lien on the building mentioned in the petition, and the jury ought to find as to the defendant, Kemper, the issues for him.

This instruction did not correctly declare the law. The right of plaintiff to a lien in this case was dependent upon an existing indebtedness to him for work and labor done and

materials furnished by him for the Kemper building, under a contract with the defendant, Williams. This indebtedness existed unless it had been discharged by the payments made by Williams. While the debt remained the lien continued. As there were other debts than the Kemper debt, due from Williams to plaintiff, payments by Williams to plaintiff, unless they were sufficient to discharge all the debts, did not necessarily discharge the Kemper debt. The effect of such payments would depend upon the appropriation thereof made by Williams, at the time of making them, or if no application were made by him, then upon the appropriation made by the plaintiff at the time of receiving them; and if no appropriation were made by either, then the law would apply them as the justice and equity of the case might require. (Waterman vs. Younger, 49 Mo., 413; Middleton vs. Frame, 21 Mo., 412; McCune vs. Belt, 45 Mo., 174.)

Bare payments upon general account could not have the effect claimed for them in the instruction under consideration, and the court committed no error in refusing it.

The question of indebtedness on account of the Kemper building was, under instructions substantially correct as to the application of the payments made by Williams on general account, fairly submitted to the jury, and we shall not disturb their finding.

The other judges concurring except Judge Vories, who is absent, the judgment will be affirmed.

STATE OF MISSOURI, *ex rel.* COOPER COUNTY, Respondent, *vs.* WILSON W. TRENT, Appellant.

1. *Mandamus—Plats and surveys of county roads made by private citizen—Failure of to deliver, etc.*—Mandamus will not lie to compel a mere private person, not acting in any official capacity, to deliver to the county clerk a book of surveys and plats of the county roads, although the plats and surveys were made under order of the court and paid for by the county.

Appeal from Cooper Circuit Court.

Hayden & Tompkins, for Appellant.

I. Mandamus will not lie against a mere private person, not exercising or claiming to exercise the functions of some office or trust in which the public is interested. (Dunklin Co. vs. District Ct., 23 Mo., 449; Hussey vs. Holland, 5 Kan., 462; High Extra Leg. Rem., § 1 *et seq.*, and § 78; People vs. Stephens, 5 Hill, 616; State vs. Scofield, 41 Mo., 38.)

Draffin & Williams, for Respondent.

I. Mandamus was proper. (Mos. Mand., 153; St. Luke's Church, etc., vs. Slack, 7 Cush., 226; Dunklin County vs. District Court, 23 Mo., 449.)

SHERWOOD, Judge, delivered the opinion of the court.

The only question worthy of consideration in this case, is whether a writ of mandamus lies against one, who, having been employed by the County Court to make a survey of all the public roads of the county, and to plat them in a suitable book, does so, and after receiving the contract price for his services, regains possession of the book and refuses to deliver the same.

The Circuit Court awarded a peremptory writ for the delivery of the book, and this ruling, together with all the intermediate steps, which led the way to such result, are assigned for error. As indicated at the outset, however, the propriety of the conclusion reached, will be the only point on which our attention will be centred. An examination of the authorities shows that, although the granting of the writ referred to

is of common occurrence, where there is no other specific legal remedy, in case an ex-officer, whether of a public or a private corporation, company, church, or society, or the executor or widow of such officer, refuses upon demand made, to deliver to his successor in office, the insignia, books, papers, etc., pertaining to such office, (Town Clerk of Nottingham's Case, Sid., 31; Anon., 1 Barn., 402; Rex vs. Wildman, 2 Stra., 879; The King vs. Ingram, 1 W. Be., 50; Rex vs. Chapham, 1 Wils.; Walter vs. Haynes, 24 Vt., 658; The People vs. Killduff, 15 Ill., 492; The People vs. Head, 25 *Id.*, 325; Bun vs. Norton, 25 Conn., 103) yet the most thorough research has signally failed to discover a single instance, where a mere private person, as in the case at bar, has ever been held answerable in such a method of procedure for books of a public nature, which were detained by him.

On the other hand, authority has been found, in full accord with our impression on the argument of the cause, that as regards a person holding no official or *quasi* official station, mandamus would not lie. (3 Steph. N. P. *2308 and cases cited.)

The case of the proprietors of St. Luke's Church vs. Slack, (7 Cush., 226,) is strongly relied on by counsel for relator, as sustaining the ruling of the court below. But that case simply decides this: that on refusal of the treasurer of a religious society, upon the expiration of his term of office, to deliver the records, etc., of the society to his successor, mandamus would issue on petition of the society, to compel him to do so. It is true that after deciding the case mentioned, and very correctly, a loose concluding remark is made, to the effect, that the writ lies to "any person" who has the books of a corporation in his possession, and refuses to deliver them up. But this observation was entirely *dehors* the record; a mere *dictum*, which finds no support in the long list of cases over which our research has ranged.

This leads to a reversal of the judgment; Judge Vories absent; the other judges concur.

S. C. Douglas, Appellant, *vs.* J. C. Orr, Respondent.

1. *Practice, civil—Evidence, weight of.*—In a civil law case the Supreme Court will not decide upon weight of evidence.

2. *Examination—Levy—Actual seizure or declaration of intention—Debtor, notification to.*—To constitute a levy, lawful as to third persons, there must be an actual as distinguished from a constructive seizure by the officer; or an exercise or claim of dominion, the goods being within his power; and the proceeding should in no case be such as not to lead to an inference of intentional concealment thereof, by the officer.

3. *Practice, Supreme Court—Appeal—Order granting—Entry of in bill of exceptions instead of record proper, how regarded.*—The transcript in a cause showed no order granting an appeal. But on *certiorari* the record thereupon brought up contained an entry in the bill of exceptions, that affidavit for appeal was made, and appeal granted. *Held*, that this entry should have appeared in the "record proper," but that the case should not be dismissed on account of such irregularity alone.

Appeal from Boone Circuit Court.

O. Guitar, for Appellant.

I. To constitute a valid levy there must have been an actual taking of the possession and control of the vehicles. (Wagn. Stat., § 19, 606; Yeldell vs. Stemmons, 15 Mo., 443; Newman vs. Hook, 37 Mo., 207; Cobb vs. Gage, 7 Ala., 619.)

Henry Flanagan with Squire Turner, for Respondent.

I. The levy was valid. (Woods vs. Vanarsdale, 3 Rawle, 401; Butler vs. Maynard, 11 Wend., 548; 23 Wend., 490; 5 Denio, 198; 12 B. Mon., 484.)

II. Although in the amended transcript the bill of exceptions states that "an appeal was granted," yet, inasmuch as the order granting an appeal is part of the record proper, and no part of a bill of exceptions, and the record fails to show such order, the appeal should be dismissed. (State vs. Griggs, 48 Mo., 557; Ray vs. Ray, 49 Mo., 301.)

Hough, Judge, delivered the opinion of the court.

It appears from the record in this cause, that on the 14th day of December, 1871, the defendant, Orr, being at the time sheriff of Boone county, and having in his hands a valid exe-

cution, from the Boone Circuit Court against one R. W. Dorsey, went to the carriage shop of said Dorsey in the town of Columbia, to get a new buggy he had purchased of him; and while one W. G. Alexander, who was the only person about the premises (Dorsey being at the time absent from town), was outside the shop, fixing the shafts on the sheriff's buggy, he went into the store room of the carriage shop, which contained a number of vehicles of various kinds, and while no one was present rolled one buggy a few feet in order to place it near another buggy in the room, and without moving any of the property from the room, or placing any mark of any kind on any of the vehicles, or putting any one in possession thereof to hold for him, and without having any possession or control over the house in which he found and left the vehicles, and without informing any person about the shop at the time, that he was making or had made a levy, he went to the court house where he met the attorney for the plaintiff in the execution, and informed him that he had made a levy, and then and there indorsed on the execution a levy on two one-horse buggies, one one-horse buggy or phaeton, one spring wagon, and two sets of harness; and left the same day for Jefferson City.

On the 18th day of December, 1871, Dorsey executed, according to law, and delivered to the plaintiff Douglas, as trustee, a deed of assignment for the benefit of all his creditors, and on the same day put him in possession of all the personal property described in said deed, including the property mentioned in the return of the sheriff, which was still in the show room of the carriage shop. Plaintiff also took possession of the room in which it was stored. It is not pretended that either Dorsey or Douglas knew anything whatever of the alleged levy, prior to or at the time of the assignment. Sometime after the alleged levy, defendant having heard of the deed of assignment, went to plaintiff and demanded the property in question, and plaintiff refusing to give it up, the defendant afterwards, about the 15th or 18th of February, 1872, without the authority or consent of plaintiff,

took the phaeton, top buggy and rockaway, which he claimed to have levied upon, from the room in which plaintiff kept them; and in March, 1872, sold the same for a sum sufficient to satisfy the execution against Dorsey, and thirty dollars more. Douglas then brought the present action against Orr to recover the value of the vehicles so taken and sold.

The testimony showed them to have been worth in the aggregate the sum of $700. The cause was tried by the court. The law was correctly declared, but the court found that plaintiff was only entitled to the sum of $30, the surplus remaining after satisfying the execution against Dorsey, and gave judgment accordingly, and plaintiff brings the case here by appeal.

We are not called upon in this case to pass upon the weight of evidence; that, it has been decided again and again, this court will not do. The question is whether there is any testimony tending to show a levy by the defendant. The facts relied upon as constituting a levy, are really undisputed; but even though some of them may be thought to be disputed, the question is, do they, if taken as true, constitute a levy? A denial by one witness of facts stated by another, upon which a verdict is based, does not present a case in which this court will refuse to interfere on the ground, that we will not weigh the testimony, if the disputed facts when taken as true, do not tend to support the verdict. In this case for instance the testimony of Alexander would seem to negative the statement of the defendant, that he moved one of the buggies. But suppose it to be true, that he did move one as stated by him, does that fact taken in connection with the other acts shown to have been done by him, constitute a levy under our statute. The word "levy" as defined by our statute means actual seizure, that is, the officer must take actual possession of the goods, and this language would seem to exclude all idea of a constructive possession.

There has been much discussion and some difference of opinion as to what constitutes actual possession. It has been said that the true test is, whether enough has been done to

subject the officer to an action of trespass, but for the protection of the execution. It has accordingly been held, that an actual manucaption of the goods is not necessary to constitute a tortious taking, and that any exercise or claim of dominion, though by mere words, the speaker having the goods within his power, may amount to such a taking as to warrant an action of trespass; that merely making an inventory, and threatening to remove goods, which is prevented by another giving a receipt for them, though they are not touched by the officer, is sufficient. (Connah vs. Hale, 23 Wend., 462.)

In the case of Camp vs. Chamberlain, (5 Denio, 198–202), cited by respondent's counsel, the court say: "In order to constitute a valid levy as to third persons, the goods must not only be within the view of the officer, but must be subjected to his control. He 'must take actual possession' which although the goods are present, can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and interested in the question. A levy cannot rest in mere undivulged intention to seize the property. Something more is required. There must be possessory acts to indicate a levy, or it must be asserted by word of mouth, so that what is thus done by the officer, if not justified by the process in his hands, will make him a trespasser."

This case is cited with approval by the Court of Appeals in Baker vs. Birminger, (14 N. Y., 270). In Gwynne on Sheriffs, Ed. 1849, p. 212, it is said: "The officer should not proceed in so secret a manner as to cut off all probable means, on the part of third persons, of knowing how to deal with the defendant, in respect to his goods. The proceedings should also be such as to apprise the defendant himself of the steps taken, or at least such as not to leave the inference of intentional concealment." (See also Newman vs. Hook, 37 Mo., 207; Yeldell vs. Stemmons, 15 Mo., 443.) Tested by the rules laid down in these authorities, the acts of the defendant Orr, in relation to the property in question, constituted no levy.

Respondents' counsel make the point in their brief, that there is no appeal here. A motion was filed at the last term to strike this case from the docket for that reason; but on suggestion of diminution of record, a *certiorari* was issued, to which return has been made, and the record now here contains an entry in the bill of exceptions, that an affidavit for an appeal was filed and an appeal granted. This entry should appear in what is termed "the record proper," but all portions of the record are of equal dignity here and we cannot turn the appellant out of court on this objection. The pleadings and the judgment in this case also appear in the bill of exceptions, and not elsewhere. All this is informal and improper, but we do not think it would justify us in refusing to pass upon the merits of the controversy.

The judgment is reversed and the cause remanded; Judge Vories absent; the other judges concur.

SAMUEL MUNDAY, Respondent, *vs.* DAVID CLEMENTS, Appellant.

1. *Justice's Court—Appeal from verdict in, no ground for dismissal.*—In justices' courts a verdict is equivalent to a judgment, and an appeal taken from a verdict instead of a judgment in such court, although not a literal, is a substantial compliance with the law, and will not be dismissed on account of such technical irregularity.
2. *Assignment of notes—Off-set against before notice of assignment.*—Under the statute relating to set-off, (Wagn. Stat., 1274, § 2) the assignment of a note after maturity, cannot defeat a just defense or off-set existing in favor of the maker and against the assignor, before notice of assignment.

Appeal from Lawrence Circuit Court.

Henry Brumback, for Appellant, referred in argument to Gen. Stat., 1865, ch. 148, § 2; Stewart vs. Anderson, 6 Conn., 203; Follet vs. Buyer, 4 Ohio St., 586.

Bray & Teel, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace on a promissory note, for the sum of seventy-five dollars.

Defendant filed a note in off-set in the Justice's Court and had a verdict in his favor; whereupon plaintiff appealed to the Circuit Court, and on a trial in that court there was a verdict and judgment in his behalf. In the Circuit Court defendant moved to dismiss the appeal from the Justice's Court because there was no final judgment from which an appeal could be taken, and because the affidavit was defective.

Both of these motions were overruled. It is now insisted that this ruling of the court was erroneous, but we are not of that opinion. The record shows a verdict of a jury in the Justice's Court, but no formal judgment was entered thereon. But it has been held from the earliest period in this State, that such failure to enter judgment on the part of the justice will not prevent an appeal to the Circuit Court. (Hazeltine vs. Rensch, 51 Mo. 50 and cases cited.) There is no merit in the objection that the affidavit was not sufficient to warrant an appeal. The affidavit is not copied into the record, but the point raised is that the affidavit stated that the appeal was taken from the verdict and not the judgment of the court. This was not a literal, but was a substantial compliance with the law. The appeal should be from the judgment, but in Justices' Courts the verdict is equivalent to a judgment, and in cases arising before justices of the peace, we will not turn parties out of court on such technicalities.

The case shows that this suit was brought on an overdue negotiable promissory note, and the only question was as to whether the defendant was entitled to have a note allowed as an off set against one of the intermediate owners of the note sued on.

It seems that the note was made by the defendant on the 10th day of October, 1871. payable to one Runyan, and due five days after date. It was assigned to Thornton on the 26th day of the same month, and immediately thereafter assigned by Thornton to J. H. Munday, Sr.

Plaintiff's evidence shows that in October or November, 1871, John H. Munday, Sr., received the note from Thornton, who was then the owner of it, as collateral security, and that he continued to hold it till January, 29, 1872, and that on that day, Thornton and John H. Munday, Jr., were talking about making a trade for the note, and that the latter was going to let his father have the note for a debt he owed him; that about the same time he delivered the note to John H. Munday, Jr., upon Thornton's written order.

The plaintiff testified that about the 29th day of January, 1872, the same day on which the trade was made between Thornton and Munday, Jr., he received the note from the latter in payment of an account he owed him, which was more than the amount of the note.

The defendant testified that sometime in February, 1872, John H. Munday, Jr., told him he had the note sued on, and asked him for the money; that he then bought a note against John H. Munday, Jr., which was the note filed as a set-off and that sometime afterwards he saw Munday, Jr., and asked him if he still had the note, and that he replied that he had; that defendant then told him that he had bought a note against him and would let him have that and in a short time pay him the balance in money, and that he made no reply; that he was not notified that plaintiff owned the note till a short time before the suit was brought.

Another witness testified that some time either in January or February, 1872, Munday, Jr., offered to trade the note for cattle. This was all the evidence and the court found for the plaintiff.

Plaintiff asked for no instructions, but the defendant asked for one which was refused, and that refusal constitutes the main question in the case. The instruction is badly drawn and not very intelligible, but the proposition intended to be asserted by it is, that if J. H. Munday, Jr., became the holder of the note after it had matured, and the defendant as maker thereof purchased the note pleaded as an off-set against J. H. Munday, Jr., before

he was notified that plaintiff had become the assignee of the note sued on, then the note held and owned by defendant against J. H. Munday, Jr., was properly pleaded, and should be allowed as an off-set against plaintiff's demand.

What effect is to be given to the weight of the testimony and whether John H. Munday, Jr., was the holder or owner of the note, at the time he applied to defendant for payment, are questions purely of fact, exclusively for the determination of the jury. But if the refused instruction announced a correct principle of law, then the judgment cannot be permitted to stand.

The statute on the subject of set-offs, declares, that in actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off or other defense which existed in his favor at the time he is notified of such assignment. (2 Wagn. Stat., p. 1274, § 2.)

This section, as it now stands, was first imported into the statute in the Revision of 1865, and was intended as a substitute for section 4 (1 R. C., 1855, p. 322), which provided that an account for sums of money or for property due on contract, might be assigned in writing, and the assignee should have the same right of action in his own name which the assignor would have had subject to the same defenses and set-offs, which the debtor would have had against the assignor prior to notice of such assignment.

Upon the precise point now under consideration, I have not found any adjudication in this court construing the statute. But the intent would seem to be sufficiently plain. The provision is, that the defendant shall be allowed every just set-off, or other defense which existed in his favor at the time he is notified of such assignment.

Under this section a defendant who has a just and lawful defense or set-off against a note which is not negotiable, cannot be deprived of his right to make his defense availing by an assignment of the note to a third party. But after he is notified of an assignment and has knowledge of the fact that the note has been transferred, he will

not be permitted to buy in a claim against the assignor, and defeat the rights of the assignee—the holder in good faith.

It follows, therefore, that if Jno. H. Munday, Jr., was the legal owner of the note, which is the subject of this litigation, and before the defendant was notified that he had assigned the same, defendant became possessed of a note against Munday, Jr., the same would constitute a valid set-off.

We do not think the case was fairly submitted, and the judgment will therefore be reversed and the cause remanded; the other judges concurring except Judge Vories, who is absent.

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STATE OF MISSOURI, Respondent, *vs.* JOHN HOWERTON, Appellant.

1. *Indictment—Robbery—Threats of violence, allegation as to.*—Under an indictment charging that a robbery was accomplished by means of threats to commit future violence, testimony showing that the injuries were to be inflicted presently, is proper.
2. *Robbery, indictment for—Value not essential.*—In indictments for robbery, the verdict of the jury need not specify the value of the property taken.
3. *Practice, criminal—Witness, refusal of to testify—Surprise—New trial.*—The refusal of a witness, placed upon the stand by the State, to testify, cannot operate a surprise upon the defendant, such as to justify a new trial, when defendant could have used him at the trial on his own behalf.

Appeal from Jasper Circuit Court.

J. F. Hardin, for Appellant.

Hockaday, Att'y Gen'l. for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted under the statute (Wagn. Stat., 456, § 21) for robbery in the second degree, and his trial resulted in a conviction. The robbery consisted in taking from one Gennan, two mules, two sets of harness, and one wagon. On the trial, the prosecution was permitted to introduce evi-

dence showing threats of immediate injury to Gennan, and this is assigned for error, because the indictment alleged that the property was obtained by threats of injury to be inflicted at a different time. But there is no force in this objection. The evidence was admissible to prove that the threats of violence operated on the fears of Gennan, and it had a very important bearing, and constituted an essential element in the offense.

Again, it is complained that the jury did not find, in their verdict, the value of the property. But this was not necessary. The charge was the taking of the mules, harness and wagon and the value was proved upon the trial. The jury, by their verdict, found the defendant guilty of taking the property in the manner charged in the indictment, and that was sufficient. There is no law, that I am aware of, requiring the jury, in the case of robbery, to specify the value of the property in their verdict. The degrees of robbery are not based upon value, and the value of the thing taken is not of the essence of the offense. The putting in fear and taking the property, constitute the gist of the crime, and there is no necessity for either charging in the indictment, or proving at the trial, or specifying in the verdict, the value of the property.

The remaining question in the motion for a new trial is "surprise" and "newly discovered testimony." The ground on which it is insisted that the defendant was surprised, is, that Gennan, the person robbed, was sworn to testify by the State, and refused to give any evidence. But it is very difficult to see how this could have operated in such a manner as to have produced a surprise on the defendants, which would justify setting aside the verdict.

The State did not press the witness to testify, as it had a right to do, but if the defendant supposed he could obtain any testimony from the witness that would enure to his benefit, there was nothing to prevent him from calling him and compelling him to give evidence. Defendant alleges that the witness is now willing to testify. But by pursuing his proper course, he could have obtained the same testimony at the trial, that he now supposes he could attain on a new one.

The manifest inference is, that when the witness was called upon to testify, he was influenced by the same fear that induced him to give up the property in the first instance. The newly discovered evidence consists in the belief, that one of the witnesses who gave evidence for the prosecution would swear differently, if a new trial were granted. It is needless to pursue this question, as it furnishes no reason for a new trial on the ground of newly discovered evidence.

The judgment should be affirmed. All the judges concur except Judge Vories, who is absent.

STATE *ex rel.* HOWELL COUNTY, Appellant, *vs.* THE JUSTICES OF HOWELL COUNTY COURT, Respondent.

1. *Demurrer, judgment upon, will not support appeal.*—A judgment sustaining a demurrer is not such a final judgment as will support an appeal.
2. *County Court House—County justices—Building of by—Mandamus.*—Mandamus will not lie to compel the justices of a County Court to build a court house. The statute (Wagn. Stat., 403, § 4) leaves the erection of county buildings entirely to the discretion and judgment of the County Court, and such discretion cannot be controlled by mandamus.

Appeal from Howell Circuit Court.

Maxey & Livingston, for Appellant.

The writ of mandamus is generally applied to the ministerial acts of inferior tribunals, (9 Mo., 119; 41 Mo., 221,) and the building of a court house by the County Court is a ministerial act. (26 Mo., 275; 41 Mo., 44; 42 Mo., 512; 49 Mo., 146.)

The doctrine laid down in County Court vs. Round Prairie Township, 10 Mo., 679, and Vitt vs. Owens, 42 Mo., 512, does not apply. In those cases the County Court had exclusive jurisdiction and had acted in the premises and performed its duty; but in the one at bar, it is made the imperative duty of the County Court to cause to be erected, at the seat of justice of each county, a good and sufficient court house. The County Court has no discretion in the premises. (Wagn. Stat., 402, § 1.)

W. S. Pope, for Respondent.

If Wagn. Stat. (403, § 4,) means anything, it must mean that the question of erection of a court house is left to the discretion and sound judgment of the County Court. It would seem that this is the case in a county where none of the buildings referred to are erected. How much more so is it the case in a county where the court has erected such buildings, and that, too, of a kind and quality that they, in their judgment, consider sufficient to meet the demands and wants of their county. (People vs. Judges of Wayne County, 1 Man. [Mich.] 359; *In re* Turner, referred to in Mos. Mand., 23; 10 Mo., 679; 42 Mo., 512.)

WAGNER, Judge, delivered the opinion of the court.

This was an application for a writ of mandamus against the defendants, who are justices of the Howell County Court, for the purpose of compelling them to build a court house. It was averred, that the court house in the county was a poor and insufficient building, and it would be greatly advantageous to have a better one; and that a petition had been presented to the County Court, requesting them to authorize and take steps to construct a better and more suitable court house, but that the defendants caused an order to be entered of record, refusing to grant the request. A peremptory writ was therefore asked, to compel the defendants to proceed with the erection of the building. At the return term of the alternative writ, the defendants filed a demurrer, which was sustained by the court, and the relator excepted and appealed. The only judgment in the case, is the one sustaining the demurrer, and that is not such a final judgment as will support an appeal. But aside from this point the judgment should be affirmed. It is manifest that mandamus will not lie in a case of this character. The statute, in reference to county buildings, provides, that whenever the County Court of any county shall think it expedient to erect any county building, and there shall be sufficient funds in the county treasury for that purpose, not otherwise appropriated, or the circumstances of

the county will otherwise permit, they shall make an order for the building thereof, etc. (1 Wagn. Stat., 403, § 4.) This law leaves the erection of the buildings entirely to the sound discretion and judgment of the County Court, and that discretion cannot be controlled by mandamus.

Judgment affirmed; the other judges concurring except Judge Vories, who is absent.

STATE OF MISSOURI, Respondent, *vs.* JOSEPH SAYERS, Appellant.

1. *Practice, criminal—Continuance—Granting of discretionary with court.*—The granting of a continuance is a matter resting very largely in the discretion of the trial court. And unless it be clearly shown that such discretion has been abused, the Supreme Court will not interfere.
2. *Practice, civil—Witness—Matters to be inquired of in cross-examination.*—On cross-examination the witness may be inquired of as to all subjects pertinent to the case, whether touched upon in the examination in chief or not.
3. *Venue—Change of in criminal cases—Prejudice of judge.*—Under the act of 1873 (Sess. Acts 1873, p. 56), the granting of change of venue in criminal cases is discretionary with the court, although the application is based upon the prejudice of the judge. (State vs. O'Rourke, 55 Mo., 440.)
4. *Instructions should be based on evidence.*—Instructions not based on evidence ought not to be given.
5. *New trial—Newly discovered evidence, when cumulative no ground.*—A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative.

Appeal from Jasper Circuit Court.

J. F. Hardin, G. H. Walser with D. P. Ballard, for Appellant, cited in argument: St. L. & Iron Mt., R. R. Co. vs. Silver, 56 Mo., 265; Page vs. Kankey, 6 Mo., 433; Brown vs. Burrus, 8 Mo., 26; State vs. Ross, 24 Mo., 475; State vs. Joeckel, 44 Mo., 234; State vs. Long, 39 Cal., 361; People vs. Sanchez, 24 Cal., 28.

Attorney General, for Respondent, cited: 8 Mo., 334, 606; 18 Mo., 47, 445, 477; 21 Mo., 423; 1 Mo., 780; 3 Mo.,

123; Bay vs. Sullivan, 30 Mo., 191; Gonsolis vs. Gearhart, 31 Mo., 585; see also 35 Mo., 201, and 36 Mo., 35.

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that the defendant was indicted at the July Term, 1873, of the Jasper Circuit Court, for the murder of Charles Wilson; and that the cause was continued from time to time, till the July Term, 1874, of that court, when he was tried and convicted of murder in the second degree. When the cause was called for trial, defendant made an application for a continuance on account of the absence of witnesses. This the court refused to grant, and from the inspection of the record, we cannot say that it was wrong.

It is not shown that the proper and requisite diligence was used. The witnesses were all residents of Jasper county, the defense had had the whole vacation from the adjournment of the last term to prepare for trial, and yet the subpœnas were only issued a few days preceding the commencement of the term at which the case was set for trial.

The granting of a continuance is a matter resting very much in the sound discretion of the trial court, and it must be clearly shown that that discretion has been abused, else this court will not interpose.

Another point raised is that the court erred in excluding testimony. It seems that a witness was examined for the prosecution, and upon his cross-examination, defendant's counsel asked him questions, in reference to matters not brought out by the examination in chief. This was objected to, and the court sustained the objection. It is true the ruling was not in accordance with the decisions of this court. We have followed the English practice in this respect, which allows a party on cross-examination to examine on all subjects pertinent to the case without regard to whether they were touched upon in the direct examination or not. But it is difficult to see how the defendant can complain here, as when he opened the case on his side, he called the same witnesses, put the questions to them that were ruled out before, and obtained all the evidence that was sought upon the cross-examination

It is further insisted that the court erred in refusing to grant a change of venue. But this assumption is wholly unwarranted. Immediately after the court overruled the motion for a continuance the defendant presented a petition verified by his own affidavit only, praying for a change of venue on the ground that the judge was prejudiced against him. The court very properly refused to award the change.

The application was not made in compliance with the law. The granting of a change of venue on account of the prejudice of the judge is not imperative upon the mere petition of the party. The act of 1873 amendatory of the 19th section of the law relating to the changes of venue, provides that: "The petition of the applicant for a change of venue, shall set forth the grounds upon which such change of venue may be sought, and the truth of the allegations shall be proved to the satisfaction of the court, by legal and competent evidence, and the prosecuting attorney may in such case offer evidence in rebuttal of that submitted in support of such application: Provided, however, that reasonable previous notice of such application shall in all cases be given to the prosecuting attorney." (Sess. Acts 1873, p. 56.)* In this case no notice of the application was given, nor was there any waiver of such notice. The truth of the allegations set forth in the application, as the grounds upon which the change of venue is sought, must be proved to the satisfaction of the court by legal and competent evidence, and the attorney prosecuting for the State has the right and privilege of introducing evidence in rebuttal. The effect is to submit to the discretion and judgment of the court what was previously imperative. (State vs. O'Rourke 55 Mo., 440.)

We have been unable to see that the court committed any error in its action in giving and refusing instructions. Of its own motion the court gave ten instructions, which clearly covered the whole case. The first four defined murder in the first degree, and what it was necessary to prove to constitute that offense. They were mainly copies of in-

*Law since amended. See Sess Acts 1875.—Rep.

structions which have often received the approval of this court. The fifth gave a definition of murder in the second degree, and the sixth and seventh informed the jury in respect to their verdict and designated the punishment. The eighth instruction, considering the evidence in the case, is entirely too favorable for the defendant. It told the jury, that "if they believe from the evidence, that at the time Wilson was killed, defendant had reasonable cause to apprehend immediate danger to himself, then he was justifiable and the jury should acquit. There was no evidence on which this instruction could properly have been based.

The testimony did indeed show, that Wilson had previously made some threats against defendant, but there was nothing to show that at the time he was killed deceased was attempting to carry out those threats; but directly the contrary appears. Wilson and defendant had had some violent words in the latter's saloon, but he exhibited no weapons and made no demonstrations, to inflict upon defendant bodily harm. He was in the act of leaving the house when the defendant got out his pistol and shot him as he was going.

There was therefore no evidence justifying the instruction. The State might well complain of it, but the defendant cannot. The ninth instruction was in reference to the credibility of witnesses, and the tenth defined what was reasonable doubt. Both are unobjectionable. The two instructions offered by the defendant, which the court refused, asserted essentially the same proposition which was contained in the eighth instruction already given. They were more amplified and specific, but there was no evidence to warrant them. What has heretofore been said as regards the eighth instruction applies to them, and they require no further comment.

The last point is that a new trial should have been granted on account of newly discovered evidence. We have attentively read all the affidavits, and fail to see anything in them authorizing a different action from that pursued by the court.

The requisite diligence is not shown, and the evidence sought to be attained is entirely cumulative, and it has often

been decided that a new trial will not be granted on such grounds.

Wherefore the judgment should be affirmed; all the judges concur except judge Vories, who is absent.

JOSEPH M. ROGERS, *et al.*, Respondents, *vs.* W. A. GOSNELL, Appellant.

1. *Contract—Promise to third person, when valid consideration for.*—It is now the prevailing doctrine that an action lies on the promise made by defendant, on a valid consideration to a third person for the benefit of plaintiff, although the latter was not privy to the consideration.

The law presumes that when a promise is made to a third person he accepts it; and to overthrow this presumption a dissent must be shown.

Appeal from Jackson Circuit Court.

Gage & Ladd, for Appellant.

I. The contract of July 18th, 1868, between the Johnson heirs and defendant, was an executory contract on both sides, in which the obligation of either party was dependent upon the performance of the opposite party, and which was subject to the control of the parties making it, and liable to be rescinded by them. (Bonaffe vs. Lane, 5 La. Ann., 225.)

II. The question in this case is not covered by the decision in Lawrence vs. Fox, (20 N. Y., 268). It may be remarked, that in that case the contract was an executed one.

W. B. Napton, for Respondent.

The questions of law in this case were formerly decided by this court. (See 51 Mo., 467.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that the plaintiffs were real estate agents, and as such they were employed to sell a piece of property for a specific amount. They succeeded in mak-

ing sale of the same to the defendant, and by the written agreement entered into between the parties to the sale, which provided that the payments on the one side and the execution of the deed on the other, should both be made at a future time, it was expressly agreed that the defendant should pay the plaintiffs one hundred and fifty dollars, the amount sued for in this action, as a part of their commission, it being stated that the same was due at that time. Subsequently the parties varied the agreement, and entered into a new contract, by which the transaction was consummated, and in accordance with this last contract the deed was made.

It is not shown that plaintiffs had anything to do with the negotiations which resulted in perfecting the last contract, further than that one of them drew up the written memorandum; and they make no claim in reference thereto.

When plaintiffs demanded payment of the sum agreed to be paid in the written undertaking, defendant refused to comply, on the ground that the agreement was not carried out, and therefore he was not liable. There was a verdict and judgment for plaintiffs.

The promise in this case was not made directly to the plaintiffs, but it was contained in the written instrument executed between the persons agreeing to sell the land and the defendant, who agreed to purchase. It was an assumpsit on the part of the defendant to pay a certain debt of the sellers of the land to the plaintiff who were their creditors.

It is now the prevailing doctrine, that an action lies on the promises made by a defendant upon a valid consideration to a third person for the benefit of a plaintiff, although the plaintiff was not privy to the consideration. (Myers vs. Lowell, 44 Mo., 228; Rogers vs. Gosnell, 51 Mo., 466.) In the carefully considered case of Lawrence vs. Fox, (20 N. Y., 268) it appeared that one Holly, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff, for money borrowed of him, and had agreed to pay it to him the next day; that the defendant in consideration thereof, at the time of receiving the

money, promised to pay it to the plaintiff the next day. Upon these facts it was held that the plaintiff for whom the promise was made might support the action. The judge who wrote the opinion of the court meets the very objection insisted upon here. He says: "It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was I think it would be difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit, and, in accordance with legal presumption, accepted by him, (Berly vs. Taylor, 5 Hill, 584 *et seq.*) until his dissent was shown?" And Johnson, Ch. J., and Denio, J., placed their concurrence with this opinion on the ground that the promise was to be deemed made to the plaintiff, if adopted by him, though he was not a party, or cognizant of it when made.

It is a presumption of law that when a promise is made for the benefit of a third person he accepts it, and to overthrow this presumption a dissent must be shown. But in this case the rule obtains with more than ordinary force. The full commission due plaintiffs for their services was three hundred dollars. By the agreement entered into between the parties, the vendors of the property were to pay one-half, and the defendant the other half. The language is: "It is further agreed that said Gosnell (defendant) is to pay one hundred and fifty dollars on their commission to Rogers and Peck, (plaintiffs) the same being due at this date." As the plaintiffs were the negotiators of the sale and drew up the instrument of writing acknowledging the indebtedness in

their behalf, they were not only cognizant of it, but their assent cannot be questioned.

The point insisted upon, that the contract of sale was executory between the parties, and that it was finally abandoned and a new one substituted for it can have no influence upon the rights of the plaintiffs. For the agreement and promise of the defendant was to pay plaintiffs the sum of one hundred and fifty dollars then due. The payment did not depend on any future contingency, but it was for past services. Plaintiffs had performed their duties, and the promise was to remunerate them. Nothing was said about any further or future services. It is not shown that plaintiffs had anything to do with the subsequent transaction, when the original contract was modified. One of them, indeed, did draw up the memorandum or agreement, but that was all, and for aught that appears, it was a mere gratuitous labor. There is nothing to connect it with the original service or contract.

The owners of the land were to pay plaintiffs a certain amount, but the defendant in their stead agreed when the bargain was made to pay one-half, and acknowledged at the time that it was due.

Plaintiff's assent fixed defendant's liability, and when they collected the amount it operated as a release of the grantors in the sale. There is no question of waiver in the case. There was no evidence on that point.

I think the judgment should be affirmed; all the judges concur except Judge Hough, not sitting.

JAMES TITTERINGTON, Adm'r, Plaintiff in Error, *vs.* EUGENE HOOKER, *et al.*, Defendants in Error.

1. *Administration—Bill in equity against heirs for sale of lands, will not lie after final settlement.*—Under the administration law of this State, the failure of personal assets of the estate will not, after final settlement of the administration, authorize a bill in equity on behalf of the creditors against the heirs, to have lands descended to them, sold to satisfy their claims.

Our statute of administration has entirely superseded the machinery of the common law; and the whole doctrine of equitable assets, marshalling of assets in equity, and bills for discovery of assets and account, is without application here, save in so far as the principles underlying those proceedings may be invoked to illustrate or explain analogous remedies afforded by our statute.

Error to Laclede Circuit Court.

Massey, McAfee & Phelps, for Plaintiff in Error.

I. An estate by descent renders the heir liable for the debts of his ancestor to the value of the property descended, and he holds the land subject to the payment of the ancestor's debts. (Metcalf vs. Smith's heirs, 40 Mo., 572; 4 Kent. Com. [12th Ed.], 419; Van Weazel vs. Wycoff, 3 Sandf. Ch., 528; Thompson vs. Brown, 4 John. Ch., 619; Clark vs. Hugh, 52 Ill., 427; 2 Spence Eq., 388.)

J. C. Young, R. P. Bland & G. W. Bradfield, for Defendants in Error.

I. It is manifest upon the face of the petition that plaintiff had an adequate and ample remedy at law. (Wagn. Stat., 100, § 47.) All he had to do was to call the attention of the Probate Court of Laclede County to the allowance of his demand, and the classification thereof, and show that the personal estate was insufficient to discharge the debts of decedent and the court would have ordered the sale of the real estate; or he could have forced the administrator to make application to the Probate Court for the sale of the real estate of decedent. (Wagn. Stat., 96, §§ 23, 24.)

A court of equity will not entertain jurisdiction for the purpose of enabling the creditors of an estate to collect their demands from the administrator of such intestate, when the

remedy at law is ample and adequate. (Peas vs. Scranton, 11 Ga., 33; Trustees, etc. vs. Robins, 19 Ga., 134.)

II. The petition shows a final settlement of the estate, from which the plaintiff failed to appeal—hence, he cannot now complain. (Picot, Adm'r vs. Bates, 47 Mo., 390; Dullard, Adm'r vs. Hardy, 47 Mo., 403; Murray vs. Roberts, 48 Mo., 307; Barton vs. Barton, 35 Mo., 158.)

Hough, Judge, delivered the opinion of the court.

This cause was heard at the November term, 1872, of the Laclede Circuit Court, on a demurrer to the following petion:

Plaintiff states that he is the administrator of the estate of Lemuel Elam, deceased, late of said county, and that letters of administration were duly granted him by the County Court of said county, and that the defendants, Eugene Hooker and Eunice Hooker, are the heirs at law, and only heirs at law, of W. A. Hooker, deceased, late of said Laclede county, who died intestate, and as such heirs at law they are the owners in fee simple, subject to the dower of their mother, of the following described real estate situated in said county, viz: The south-west quarter of the south-west quarter, and the north-east quarter of the south-west quarter, and the west half of lots one and two of the north-east quarter, and the north-west quarter of the south-east quarter, all in section number four (4,) township number thirty-four (34,) range number sixteen (16,) west of the fifth principal meridian; and which said real estate descended to them from the said Wm. A. Hooker, deceased, who was their father; and that the defendants now are, and for a long time past have been in possession of said real estate.

Plaintiff states that letters of administration were duly granted by the County Court of Laclede county on the estate of said W. A. Hooker, deceased, to one C. B. Churchill, and that some time after the expiration of three years after the grant of letters of administration as aforesaid, the said estate was reported by the said administrator as set-

tled, and his account as such administrator was closed by the Probate Court of said county, and he discharged from his administration.

Plaintiff further states that said Lemuel Elam, in his life-time, obtained a judgment against the administrator of said Wm. A. Hooker in the Circuit Court of Laclede county, Mo., for the sum of $519 75 debt, and $280 08 damages and costs of suit; and that after the death of said Hooker, and after letters of administration were granted on his estate, said judgment of the Circuit Court was exhibited at the said County Court for allowance and classification, and that the same was allowed for a large sum, viz: $902 17, and was classed in the fourth class of demands; and plaintiff states that said judgment so allowed by the said County Court is still in full force, and that neither the same, nor any part thereof, has been paid or satisfied by the administrator of said Hooker, deceased, nor by any one else; and plaintiff further states the administrator of the said Hooker did not pay any part of said judgment or allowance, although ordered to pay off the demands established against Hooker's estate; and he is informed and so believes that all the personal property of the said Wm. A. Hooker which came to the hands of this said administrator was exhausted and disposed of in paying the demands against said estate, and in defraying the expenses of administration.

Plaintiff charges that said Churchill, who was administrator of the estate of Wm. A. Hooker, deceased, is insolvent, and that he has no adequate relief at law. Plaintiff therefore prays the court to render judgment in his favor for the amount of said judgment or allowance, established as aforesaid against the estate of said Hooker, deceased, with interest thereon at the rate of ten per cent., the "plaintiff averring that rate of interest was the rate of interest of the demand upon which judgment was rendered, and for the costs of proceedings in the Circuit Court aforesaid adjudged against the defendant in that suit," and that if said judgment shall not be paid that the same shall be levied of the aforesaid

real estate, or so much thereof as shall be necessary to satisfy said judgment and costs of suit, and for other proper and suitable relief.

The demurrer states the following grounds of objection: 1st. That said petition contains no equity, and alleges no matter which entitles plaintiff to any equitable relief, and does not state facts sufficient to constitute a cause of action; 2nd. That it is manifest upon the face of said petition that plaintiff has an ample and adequate remedy at law, which he is now at liberty to pursue, or which by his own laches and neglect he has failed to pursue in the proper time and appropriate way.

The question presented for determination in this case is whether, under our law, on a failure of personal assets and after final settlement, a bill in equity will lie on behalf of a creditor of an intestate against his heirs to whom lands have descended from him, to have such lands sold to satisfy the demands of such creditor. Whenever real estate is by statute made liable for the payments of the debts of the deceased, it constitutes legal assets, (1 Sto. Eq., § 552, Ed. 1873,) and it has been said that the true test as to whether the assets are legal or equitable is not whether the executor or administrator, but whether the claimant, can reach them without resorting to a court of equity. (2 Will. Exrsn., 1520.) In this State any creditor may, in default of other assets, proceed to subject real estate to the payment of his demand, and the court exercising probate jurisdiction may, of its own motion in a proper case, order it to be done. Wherever the doctrine of marshalling assets in administration obtains, courts of equity follow the same rules in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is allowed at law. (1 Sto., Eq., § 553.) Under our statute, demands against the estate of any deceased persons are divided into six classes, and are required to be paid in the order in which they are classed, and no demand of one class shall be paid until all previous classes are satisfied. This order of

priority in classification and payment could not be disregarded even by a court of equity. If this bill can be maintained, it would be the duty of the court to ascertain whether any debts in the classes having priority over the class to which plaintiff's claim belongs remained unpaid, and if so, and the value of the estate sought to be subjected to the satisfaction of plaintiff's claim did not exceed the amount of such unpaid debts having priority over his, to give judgment for the defendants. If there remained no debts in the prior classes unpaid, but debts in the same class, the amount of such unpaid debt should be ascertained and the proceeds of the lands in the hands of the heirs be divided ratably between them. The whole settlement of the estate in question might thus be transferred from the tribunal specially established by the statute for the administration of estates to a court of equity, and that, too, after a final settlement, having the validity of any other judgment from which there has been no appeal, and which remains unassailed on account of any fraud. Statutory provisions have existed in some of the States having administration laws similar to ours providing that the heirs might be sued and held liable for the debts of the deceased to the extent of the estate, interest and right in the real estate descended to them from the decedent, but only after the personal assets had been exhausted, and when after due proceedings before the proper Surrogate Court, and at law the creditor had been unable to collect his debt or some part thereof from the personal representatives of the deceased, or from his next of kin or legatee; and these facts were required to be affirmatively shown by the creditor in his bill. The case of Van Weazel vs. Wycoff, (3 Sandf. Ch. 528,) arose under such a statute; also, the case of Butts and Havens vs. Genmrig, (5 Paige, 254). The case of Thompson vs. Brown, (4 Johns. Ch., 619,) cited by plaintiff in error, was a bill against the administrator for discovery and distribution of assets.

We are of opinion that the precise and simple yet effective provisions of our administration law, whereby the

whole estate of a decedent, both real and personal, may be subjected to the payment of his debts, were designed to entirely supersede the more cumbrous machinery of the common law, and that the whole doctrine of equitable assets, marshalling assets in equity for the payment of debts, and bills for discovery of assets and account, is without application here, save in so far as the principles underlying those proceedings may be invoked in illustration or explanation of analagous remedies afforded by our statute.

That an estate by descent renders the heir liable for the debts of his ancestor to the value of the property descended, and that he holds the lands subject to the payment of the ancestor's debts, is a proposition approvingly stated by this court in the case of Metcalf vs. Smith's heirs, (40 Mo., 576); but this statement was made in contradistinction to the common law rule by which land descended or devised was not liable to simple contract debts of the ancestor or testator, nor by a specialty unless the heir was expressly named. In that case it appears that one Smith died in 1843, seized of certain land; that in 1852, and before the final settlement which took place in 1857, a proceeding in partition was instituted by the heirs of Smith, under which, said land was sold and a portion thereof purchased by the plaintiffs, Metcalf and Snyder. In September, 1853, suit was instituted against the administrator of Smith for a breach (occurring in 1848) of the covenants in a deed executed by Smith in 1843. The plaintiff in that suit obtained judgment, and on the petition of the administrator the land previously sold by the heirs in partition was sold to satisfy this judgment. At the execution sale, Mrs. Tyler, the owner of the judgment, bought the land, and Metcalf and Snyder paid her the amount of the judgment, and received from her quit-claim deeds for the premises. They then instituted suit against the heirs of Smith for the amount paid by them to protect and perfect their title. The money received by the heirs from the partition sale should have gone to pay the debts of the estate, but as the funds arising from the partition sale were

not, on the application of the administrator, paid into court for the benefit of the creditors, as in the case of Langham vs. Darby, (13 Mo., 553,) and the plaintiffs in effect paid it for them, they were permitted to recover from the heirs as for money paid at their instance and request. That opinion was not intended to sanction any such proceeding as this. Metcalf and Snyder were not in any sense creditors of the estate of Smith, but had simply paid money to the use and benefit of the heirs, and a recovery from them was supported on that ground. The creditors of the estate obtained satisfaction of their judgment through a sale of the lands of the intestate by the administrator, in pursuance of the statute. Now, by statute, the proceeds of a partition sale of lands descended, made pending administration, cannot be paid to the heir until final settlement, unless it appear that there are other assets sufficient to pay the debts of the estate. (2 Wagn. Stat., 973–4, § 51.) Ample time and means are given under our law for the creditor to subject the real estate of the decedent to the payment of his debt. In the petition under consideration it is stated that the demand of the plaintiff was allowed and ordered to be paid. If so, there must have been assets in the hands of the administrator. An execution should have been issued against him under the statute, and if it proved unfruitful, the plaintiff might have sued out a *scire facias* against his sureties, and if all these means failed, he could still obtain an order to sell the real estate; or if the administration was without notice and fraudulently brought to final settlement, the plaintiff might have set aside such settlement by the proper proceeding, re-opened the administration and sold the land. No dates appear in the petition showing when the transactions complained of occurred. The Circuit Court committed no error in sustaining the demurrer and dismissing the bill, and its judgment is affirmed.

Judges Wagner and Napton concur, Judge Vories absent, Judge Sherwood not sitting

ALMEDA WILBUR, Respondent, *vs.* JOHN P. JOHNSON, Appellant.

1. *Evidence—Leading questions, admission of no ground for reversal.*—The admission of leading questions is a matter resting very much in the sound discretion of the trial court, and cannot furnish ground for reversal.
2. *Statute of frauds—Promise to marry, etc.*—Whether a verbal promise to marry, when not to be performed within one year, is within the statute of frauds, *Quære?*
3. *Breach of promise—Suit for—Testimony as to finances of defendant.*—In suit for breach of promise, where plaintiff introduces no proof as to defendant's pecuniary condition, the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.
4. *Breach of promise—Damage to feelings—Seduction, etc.*—Where a woman brings her action for breach of promise to marry, she may recover for injuries to her feelings, affections and wounded pride, as well as for the loss of marriage; and her seduction may be given in evidence to aggravate the damages.
5. *Breach of promise—Measure of damages, when left to the jury.*—In action for breach of promise, the measure of damages is a question for the sound discretion of the jury in each particular case; and unless it appears that the jury were influenced by passion, prejudice or corruption, the verdict will generally be allowed to stand.

Appeal from Jasper Court of Common Pleas.

J. M. Allen, for Appellant.

I. Neither the contract nor the promise of marriage were in writing. The court manifestly erred therefore in permitting evidence relating thereto. (Pars. Cont., [5 ed.,] vol. 2, pp. 63, 64; Derby vs. Phelps, 2 N. H., 215.)

II. It was lawful for defendant to show his financial condition. (Sedg. Dam., [3 ed.] ch. 7, p. 219; Green vs. Spencer, 3 Mo., 172, [Houck's ed].

III. The evidence shows that the child was begotten before any valid promise of marriage, and that the seduction, if any, took place prior to any promise of marriage (Sedg. Dam., [3 ed.] ch. 24, p. 388, and authorities cited; Green vs. Spencer, *supra;* Sauer vs. Schulenberger, 3 Am. Rep., 174.)

IV. The evidence clearly showed that the only promise alleged to have been made by the defendant was made in consideration of sexual intercourse, and the consideration being immoral and against public policy, the contract or promise

founded thereon is void. (Sto. Cont., [3 ed.] ch. 18, § 541; Green vs. Spencer, *supra*; Sedg. Dam., [3 ed.] ch. 14, p. 388, and authorities cited.)

E. J. Montague, for Respondent.

I. Respondent had the right to bring the fact of seduction before the jury in aggravation of damages. (Sedg. Dam., [3 ed.] § 88, beginning on page 387.)

II. Appellants confound a promise to marry *inter sese* with an "agreement made in consideration of marriage." (2 Pars. Cont., 63, 64, and notes.) The statute of frauds obviously refers to "agreements made in consideration of marriage," which affect estates and property.

III. Appellant could not introduce his poverty as matter of affirmative defense. Resting his defense upon a denial of the promise to marry, he was not in a condition to confess and avoid with his evidence.

IV. The jury may take into consideration the injury to the feelings, affections and wounded pride of the plaintiff, and the loss of marriage. (Sedg. Dam., [3 ed.] 388.) In case of seduction, that fact may be shown in aggravation of damages.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought her action in the court below, against the defendant, for a breach of marriage contract, and claimed $10,000 damages. On a trial of the issues framed, the jury awarded her $2,000, for which amount judgment was rendered and defendant appealed.

The evidence in reference to the contract was contradictory. Plaintiff was sworn in her own behalf, and she testified positively to the fact, that the contract of marriage was entered into between them, and that she was ready and willing to comply with it on her part, but that defendant had refused and married another woman. She was corroborated and sustained by other testimony, and the only evidence to the contrary was given by the defendant himself.

The verdict of the jury is conclusive on the question, and fully establishes the contract. In the course of the examination in chief, the plaintiff's counsel put to the witness direct or leading questions, to which the defendant objected. His objections were overruled, and he excepted, and now assigns the ruling of the court for error.

Whilst as a general rule, leading questions are not permissible in a direct examination, yet their admission is a matter resting very much in the sound discretion of the court, and it is too well settled to require the citation of any authority, that where they are allowed, their admissibility cannot be assigned for error, nor furnish any reason for a reversal. We cannot see that they were objectionable for any reason except that they were leading.

It seems that plaintiff was seduced by the defendant after the promise of marriage, and that a child was born in consequence of the illicit intercourse between the parties. When the plaintiff was being examined, she was permitted to testify in reference to defendant's demeanor towards the child, and his recognizing it as his; and it is insisted that this was erroneous, because no contract of marriage had been proved. But this is assuming entirely too much. The child was referred to in connection with the promises made by the defendant at different times, and this testimony constitutes a part of the narrative. It was called out incidentally, as showing his manner of treating the plaintiff and what he said on that occasion. Plaintiff said nothing more about the seduction, upon her direct examination, and the details of that disgusting transaction were left to be developed by the defendant on the cross-examination in all its grossness.

It is contended that the promise was void under the statute of frauds, because not made in writing, and the courts in England formerly so decided, but they have since taken a distinction between promises to marry and promises in consideration of marriage; this latter expression being the words used in the statute of frauds. In this country it has been held, that a promise to marry at the end of five years

was within that clause of the statute which requires that a promise not to be performed within one year from the making shall be in writing. If we adopt this latter conclusion, still the objection is not good, as the evidence clearly shows that the promise, if any was made, was to be performed in less than one year.

The defense offered to show defendant's pecuniary condition, and this was ruled out. I have no doubt about the correctness of the decision. Plaintiff had introduced no evidence in reference to the wealth of the defendant. The evidence was not therefore in rebuttal of any issue tendered on the other side; and it would be a strange proceeding to permit him to show his pecuniary circumstances, to decrease the damages occasioned by his own wrong. Under that view it would be only necessary for a man to show that he was very poor to escape with comparative impunity.

As to the instructions, the chief complaint is in giving the third in the series, for the plaintiff, and refusing the second one offered for the defendant. The third instruction given at plaintiff's request told the jury, that if they should find for the plaintiff, they should assess her damages at any sum not exceeding ten thousand dollars; and in determining the amount of damages which the plaintiff had sustained, they might take into consideration the injury done to her feelings, affections, and wounded pride, and the condition in which she was left. Defendant's instruction, which was refused, declared, that if the jury believed from the evidence, that the only promise made by the defendant was made in consideration that the plaintiff would permit the defendant to have sexual intercourse with her, then the jury should find for the defendant. In respect to this instruction, it is only necessary to say that the evidence did not support it, and therefore the court did not err in refusing to give it.

The instruction given for the plaintiff is unobjectionable. The action is given as an indemnity to the injured party for the loss she had sustained, and has always been held to embrace the injury to the feelings, affections and wounded pride

as well as the loss of marriage. (Sedg. Dam., 6 ed., 455.) And this court at an early day established the principle, that seduction might be given in evidence to aggravate the damages. (Green vs. Spencer, 3 Mo., 318; Hill vs. Maupin, *Id.*, 324.)

There is nothing in the point made, that the damages are excessive. From the nature of the case, it is impossible to fix the amount of compensation by any precise rule; and as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance. (Sedg. *supra.*) Unless it can be shown that the jury were influenced by passion, prejudice or corruption, the verdict will generally be allowed to stand.

In my opinion the judgment should be affirmed; the other judges concur except Judge Vories, who is absent.

INDEX.

ACCOUNT STATED.

1. *Account stated—Evidence—Assent.*—A petition, to recover an alleged balance found due upon settlement with the defendant, is not sustained by proof of the indebtedness concerning which the alleged settlement was made. It must appear that the defendant assented to the settlement or to the balance found against him.—Cape Girardeau & State Line R. R. Co. vs. Kimmel, 83.

2. *Account stated—Evidence—Dissent of party.*—An action upon account stated cannot be maintained where it appears that the defendant at the time dissented from the balance found, and claimed an additional credit which was disallowed.—Id.

3. *Corporations—Minutes—Evidence—Stranger—Settlement.*—The minutes of the board of directors of a corporation are not competent testimony against an outside party to prove a settlement made with him by a committee.—Id.

ACKNOWLEDGMENT; See Conveyances, 6; Mortgages and Deeds of Trust, 15, 17, 22, 23.

ACTS OF LEGISLATURE; See Forest Park, 1.

ADAIR COUNTY; See Court, Adair County Probate.

ADMINISTRATION.

1. *Administrator, sale by—Purchase by administrator at, will be held in trust for estate, when.*—The statute requiring the appraisement of land held by an administrator, before he can purchase the same, has no application to his purchase of land sold under deed of trust given by the decedent. But he cannot in such case speculate on the interests of the creditors and distributors of the estate, and sacrifice them to his own individual interest. Such a purchase would be presumed to be for the benefit of the estate; and at all events would be closely examined by a court of equity, if questioned by those interested in the estate.

And where it appeared that although nominally made by the trustee named in the deed of trust, the sale was in fact prompted by the administrator, the latter would be regarded in a court of equity as the vendor, and his purchase would be held to have been made in trust for the benefit of the estate.—Harper v. Mansfield, 18.

2. *Limitations—Administrator—New promise.*—An administrator cannot, by a new promise, take a debt of his intestate out of the statute of limitations.—Cape Girardeau Co. v. Harbison, 90.

3. *Mortgage—Foreclosure—Administration—Allowance of demand.*—In a proceeding for foreclosure against a purchaser of the land, it is not necessary to show that the debt has been allowed against the deceased mortgagor.—Id.

4. *Administrator, judgment against, in Circuit Court—Motion to quash execution—Appeal from, etc.*—In this State a judgment against an administrator, rendered in the Circuit Court, will not authorize an execution in that tribunal, but must be executed by a proceeding in the Probate Court. But *semble*, that in case of appeal from judgment rendered on motion to quash such execution, and in the absence of any appeal or writ of error from the judgment in the cause, the Supreme Court will not interfere.—Wernecke v. Wood, 352.

ADMINISTRATION, continued.

5. *Administration—Probate Court—Appeal—Partnership estate.*—An appeal lies to the Circuit Court from the judgment of the Probate Court, on a proceeding by the administrator of a deceased partner, citing the surviving partner to show cause why he should not turn over property to the administrator.—McCrary Adm'r, v. Menteer, 446.

7. *Practice, civil—Affidavit—Amendment of—Embezzlement of notes.*—In suit against an administrator, for embezzling notes, given by him to the deceased, the court may, in its discretion, refuse to permit plaintiff to file an amended affidavit, embracing, in his charge other and different notes, the evidence showing no injury resulting to plaintiff by reason of such refusal.

Amendments should always be permitted on such terms as may be imposed, unless the applicant has been guilty of *laches*. But in all such cases, a large discretion must be given to the court.—Stewart v. Glenn, 481.

8. *Administrator—Testimony of, as to embezzlement of notes of deceased—Witness act, etc.*—In suit against an administrator for embezzling and failing to inventory notes given by him to the deceased, the administrator is not incompetent under the statute (Wagn. Stat., 1372-3, § 1). The issue in such a case is not a contract to which the deceased was a party, but the receipt and embezzlement or concealment of the notes by defendant.—Id.

9. *Administrator—Embezzlement of notes by—Notes must be in possession of—Constr. Stat.*—Under the statute (Wagn. Stat., p. 85, §§ 7, 8, 10, and 11) an action against an administrator, for concealing and embezzling notes, will not lie, unless they are in his possession at the commencement of the proceeding.—Id.

10. *Administrator's sales—Approval by court—Record.*—Regularly the approval by the court of the report of an administrator's sale ought perhaps to be entered of record, but if no formal entry is found reciting this, it does not follow that the sale is void and liable to be overthrown in a collateral proceeding.—Jones v. Manly, 559.

11. *Sales, judicial—Irregularities—Formalities.*—It is the policy of the law to uphold judicial sales and to look with leniency on minor irregularities, which do not affect nor prevent a substantial compliance with those formalities which it is always best and safest to strictly observe.—Id.

12. *Administration—Bill in equity against heirs for sale of lands, will not lie after final settlement.*—Under the administration law of this State, the failure of personal assets of the estate will not, after final settlement of the administration, authorize a bill in equity on behalf of the creditors against the heirs, to have lands, descended to them, sold to satisfy their claims.

Our statute of administration has entirely superseded the machinery of the common law; and the whole doctrine of equitable assets, marshalling of assets in equity, and bills of discovery, is without application here, save in so far as the principles underlying those proceedings may be invoked to illustrate or explain analogous remedies afforded by our statute.—Titterington v. Hooker, 593.

See Court, Adair County Probate; Dower; Wills.

ADMISSIONS; See Evidence; Limitations, 6, 7, 8; Presumptions.

ADVANCEMENT; See Husband and Wife, 3.

AGENCY.

1. *Principal and agent—Representations of agent.*—The representations of an agent respecting the subject matter of his agency, if made at the same time with the transaction, as part of the *res gestæ*, will bind the principal.—Robinson v. Walton, 380.

2. *Principal and agent—Question of agency for the jury.*—The question of agency is one for the determination of the jury.—Id.

See Bills and Notes, 5; Court, County, 1, 2; Husband and Wife, 4; Mortgages and deeds of trust, 19, 20; Partnership, 4.

AMENDMENT; See Administration, 6; Husband and Wife, 6, 7; Judgment, 1, 5, 6; Process, 2.

ARBITRATION AND AWARD.

1. *Arbitration and award—Confirmation, effect of.*—Section 17 of the act concerning arbitrations and awards (Wagn. Stat., 145) imparts to a judgment of confirmation of such award equal force with judgments in ordinary actions; and such a confirmation is fully as conclusive as though the judgment had been obtained in an action on the award.—Shelbina Hotel Association, v. Parker, 327.

APPEARANCE; See Practice, civil, 1; Practice, civil—Appeal, 1; Practice, criminal, 6.

ASSAULT; See Damages, 1, 2.

ASSIGNMENTS; See Trusts and Trustees, 1.

B.

BANKS AND BANKING; See Revenue, 1.

BAWDY HOUSES; See St. Louis, city of.

BILLS AND NOTES.

1. *Promissory note—Negotiability—Contracts.*—A note expressed to be "for value received in certificate of stock No. 650, for 10 shares of the capital stock of the State Insurance Company," and payable to the order of the treasurer, "in instalments not to exceed ten per cent. on each share, at thirty days' notice of call from the Board of directors," is a negotiable promissory note within the statutory definition.—Stillwell v. Craig, 24.

2. *Corporation—Promissory notes—Trust—Capital stock.—Quære,*—whether a corporation can make a valid transfer of such a note, when held by it as part of a trust fund representing its capital stock?—Id.

3. *Bills and notes—Parties—Descriptio personae—Intention.*—The question whether parties to a bill or note are to be held as individuals or in official capacities, must be determined by their intent, as gathered from the whole instrument, however inartificially it may be drawn, or however informally the intent may be expressed.—Klosterman v. Loos, 290.

4. *Bills and notes—Innocent indorsees—Validity—Misrepresentations.*—Negotiable notes or indorsements in the hands of indorsees, though made simply for the accommodation of the original debtor, can be enforced against such makers or indorsers, although procured by misrepresentations made by the debtor to such makers or indorsers, if the indorsees or holders were not privy to the misrepresentations or frauds or unfulfilled promises of the debtor.—Whittemore v. Obear, 280.

5. *Bills and notes—Validity—Surety—Agent, fraud or misrepresentations of.*—If a surety on a negotiable instrument makes the principal his agent, and the agent is only authorized to deliver it on certain conditions, not complied with by the agent, the surety cannot defend on the ground of frauds or misrepresentations made by his agent.—Id.

6. *Composition—Signature of all creditors—Waiver—Surety—Liability.*—A composition agreement between creditors and their debtor and his surety provided that the surety should indorse certain notes of the debtor, provided that all creditors to amounts exceeding $200.00 should sign. *Held,* that it was the duty of the surety to see to it that all such creditors had signed the agreement, and that his indorsement of the notes, as to a creditor who was ignorant of any failure in the fulfillment of the condition, or its procurement by fraud, was a waiver of that condition, and that he could not avail himself of such failure or fraud against such creditor; and even if the creditor was aware of such failure or fraud, and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defense.—Id.

7. *Bills and notes—Consideration—Innocent holder.*—The consideration of a negotiable promissory note, in the hands of an innocent holder for value, cannot be inquired into, and before the consideration can be impeached it must be first shown that the holder had notice of the lack of consideration.—Merrick v. Phillips, 436.

BILLS AND NOTES, continued.

8. *Bills and Notes—Sureties—Notice to holder to sue principal—Due diligence—Rights of surety.*—Under the statute concerning sureties and their discharge (Wagn. Stat., 1302 *et seq.*) the creditor who has been notified, as provided in section 1, must do two things; first, he must commence suit against the principal debtor within thirty days; second, he must prosecute his suit with due diligence, in the ordinary course of law, to judgment and execution, or else the surety, who may be joined in the action with his principal, will be discharged. Due diligence in the prosecution of the suit is just as essential as commencement within the time limited, in order to fix the liability of the surety after such notice. If the creditor brings such suit and fails to obtain service on the principal at the first term, he should take out an *alias* summons to the next term, and then under Wagn. Stat., (1010, § 20,) he would be entitled to judgment against the surety in case service was not had on the principal, unless the surety should consent to further delay.—Peters v. Linenschmidt, 464.

9. *Bills and Notes—Surety, action against.*—The creditor, under the statute, has a right to sue both principal and surety; and when the summons against the principal is returned *non est*, he has a right to dismiss, as to the principal, and proceed against the surety alone.—PER NAPTON, JUDGE, DISSENTING.—Id.

10. *Bills and Notes—Extension of time of payment—Sureties—Interest in advance.*—A promise of extension of time upon a note, in order to discharge a surety, must be such as will prevent the holder from bringing an action against the principal. The taking of interest in advance will not constitute such a promise. (Hosea vs. Rowley, 57 Mo., 357.)—Coster v. Mesner, 549.

11. *Assignment of notes—Off-set against before notice of assignment.*—Under the statute relating to set-off, (Wagn. Stat., 1274, § 2) the assignment of a note after maturity cannot defeat a just defense or off-set existing in favor of the maker and against the assignor before notice of assignment.—Munday v. Clements, 577.

See Mortgages and Deeds of Trust, 5, 12; Practice, civil-Pleadings, 2, 4, 5.

BOARD OF EQUALIZATION; See Revenue, 3, 4, 5, 6.

BREACH OF PROMISE.

1. *Breach of promise—Suit for—Testimony as to finances of defendant.*—In suit for breach of promise, where plaintiff introduces no proof as to defendant's pecuniary condition, the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.—Wilbur v. Johnson, 600.

2. *Breach of promise—Damage to feelings—Seduction, etc.*—Where a woman brings her action for breach of promise to marry, she may recover for injuries to her feelings, affections and wounded pride, as well as for the loss of marriage; and her seduction may be given in evidence to aggravate the damages.—Id.

3. *Breach of promise—Measure of damages, when left to the jury.*—In action for breach of promise, the measure of damages is a question for the sound discretion of the jury in each particular case; and unless it appears that the jury were influenced by passion, prejudice or corruption, the verdict will generally be allowed to stand.—Id.

See Frauds, Statute of.

BURDEN OF PROOF; See Negligence, 2; Wills, 6.

C.

CARRIERS.

1. *Common Carriers—Sufficiency of vehicles determined by in first instance.*—It is the business of common carriers to have vehicles suitable for the transportation of the freight shipped, and they are responsible for losses occurring in consequence of defects in this regard. But the carrier is the judge of the sufficiency of his carriages in the first instance.—Sloan v. St. L., K. C. & N. R. R. Co., 220.

CARRIERS, continued.

2. *Common Carriers—Flat Cars—Standards—Hay, shipment of.*—A railroad held not liable for standards placed upon flat cars to insure the safe transportation of hay, the standards having been erected by the shipper voluntarily and without any contract with the company.—Id.

CHARACTER; See Evidence, 12; Witnesses, 8, 9.

CHARIVARI; See Corporations, Municipal, 1.

CLERK OF COURT; See Process.

COMPOSITION; See Bills and Notes, 6; Garnishment, 2

CONDEMNATION OF LAND.

1. *Condemnation of land—Road—Use—Title.*—An act of the legislature, giving a corporation the right to locate its road upon certain land, does not convey title to the land itself, so as to enable it to convert the lands which still belonged to individuals subject to the easement of the road, to entirely different purposes. Before the corporation can acquire the title, it must procure the condemnation of the land as provided by law.—Cape Girardeau & Bloomington M. & G. R. Co. v. Renfroe, 265.

2. *Statutes, construction of—Railroads—Condemnation of land.*—The statute authorizing the appropriation of land for railroad purposes (Wagn. Stat., 326) is in derogation of the common law, and should be liberally construed in favor of those whose rights are to be affected by it.—Mississippi River Bridge Co. v. Ring, 491.

3. *Railroads—Condemnation of land—Commissioners, report of—Review—Evidence—Alteration.*—Upon exceptions filed to the report of commissioners appointed to condemn land for railroad purposes, the court should review by evidence the action of the commissioners, and supervise their finding so as to do substantial justice. The court may approve or reject the report, but cannot alter it.—Id.

4. *Railroads—Land, condemnation of—Removal of property—Ownership—Trespass.*—After the condemnation of land in favor of a railroad, the property thereon belongs to the railroad, and if the former owner removes any of it he will be liable to an action of trespass.—Id.

5. *Lands, condemnation of—How to be appraised.*—In condemning land its value is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply with reference to its productiveness to the owner in the condition in which he has seen fit to leave it.—Id.

6. *Lands, condemnation of—Benefits, how assessed.*—In proceedings to condemn land, the benefits, which are to be assessed against a tract of land, are the benefits resulting to that tract in particular, and not the general benefits accruing to it in common with other land which is enhanced in value by the erection of the improvements.—Id.

See Forest Park.

CONSIDERATION; See Bills and Notes; Contracts.

CONSPIRACY; See Witnesses, 9.

CONSTITUTION OF MISSOURI; See Forest Park, 1; Practice, Supreme Court, 4; Statutes, construction of, 1, 2.

CONSTITUTION OF U. S.; See Marriage, 2.

CONTINUANCE; See Practice, civil—Trials, 3.

CONTRACTS.

1. *Contracts—Sales of land—Rescission of—Vendee cannot be held liable for rent.*—One who enters upon land as a vendee cannot, upon a subsequent rescission or breaking up of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived from the use of the land, in ascertaining which he may be allowed for all outlays in improvements.—Kirkpatrick v. Downing, 32.

CONTRACTS, continued.

2. *Contracts—Sale of lands—Rescission of—Measure of damages to vendee.*—Where the vendor in a contract for the sale of land knew at the time the contract was entered into that he had no title, or if the sale goes off because he changes his mind, or because he neglects to take the proper steps to put the purchaser in possession, the purchaser may, in an action for breach of such contract, recover, beyond his expenses, damages for the loss of his bargain; and the measure of damages is the value of the land, at the time of the breach. Where there is no evidence given, showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land; but when there is evidence given, showing a change in the value of the land, its value at the time the breach occurred and when the conveyance ought to be made will furnish the standard of damages.—Id.

3. *Instructions—Compliance with contract question of fact for the jury.*—In building contracts the question, whether the work was done as required by the contract, is one of fact for the jury. An instruction, "that the plaintiff, by undertaking to do defendant a plain, substantial and workmanlike job, did not undertake to do a perfect one," is erroneous, for the reason that it took from the jury a question of fact which it was their province and not that of the court to determine. *Held*, further, that to do a thing in a plain, substantial and workmanlike manner, would imply that it should be perfectly done for the character of the job contemplated.—Smith v. Clark, 145.

4. *Contract—Promise to third person, when valid consideration for.*—It is now the prevailing doctrine that an action lies on the promise made by defendant, on a valid consideration, to a third person for the benefit of plaintiff, although the latter was not privy to the consideration.

The law presumes that when a promise is made to a third person, he accepts it; and to overthrow this presumption a dissent must be shown.—Rogers v. Gosnell, 589.

See Bills and Notes; Breach of promise, 1, 2, 3; Equity, 1, 3; Frauds, Statute of; Interest, 1; Marriage, 2; Mortgages and Deeds of Trust; Partnership, 1.

CONVEYANCES.

1. *Deeds of trust—Failure to name trustee—Effect of deed in equity.*—The failure to insert the name of the trustee in a deed of trust, when in other respects the instrument is complete, although at law it makes the deed inoperative, does not wholly vitiate it. The deed will nevertheless be regarded as an equitable mortgage, and held to create a lien for the benefit of the creditor, which may be enforced in equity. And the assignee of the note will be subrogated to all the rights and equities of his assignor.—McQuie v. Peay, 56.

2. *Conveyances in blank—Power of married woman to delegate authority to fill up deed.*—A person, competent to convey his real estate, may sign and acknowledge the deed in blank, and deliver the same to an agent with authority to fill up the blank and perfect the conveyance. But a married woman can make no such conveyance of her separate estate, having no authority to delegate such powers.—Id.

3. *Married woman—Power to mortgage separate estate.*—The wife has, in equity, the same power over her separate estate as a *feme sole*, and may bind it by mortgage or deed of trust.—Id.

4. *Conveyances—Validity—Record.*—A deed of land not recorded in the county, where the land lies, is good between the parties thereto, and as to all others except purchasers without notice for value.—Cape Girardeau and Bloomington M. & G. R. Co., v. Renfroe, 265.

5. *Conveyances—Wills—Life estate—Power of disposition—Case stated—Estate conveyed.*—It is generally true that an absolute power of disposition over property conferred by will, and not controlled by any provision or limitation, amounts to an absolute gift of the property; but where a life estate only is expressly given, the rule is otherwise. (Runey vs. Burnett, 12 Mo., 1; Gregory vs. Cowgill, 19 Mo., 415.) A deed conveyed property to a trustee for the spe-

CONVEYANCES, continued.

cial use and benefit of the grantor's wife and her children, and the *habendum* clause expressed the conveyance to be for the special use and benefit of the wife during her natural life, or her widowhood, and after her death, for the special use of her children. The deed also gave the trustee power, at the special instance and request of the wife, to sell or dispose of all of said property and apply the proceeds to the special use of the wife and children, "but specially limited to her natural life and widowhood," as aforesaid: *Held*, that the interest of the wife was limited to the use and benefit of the property during her natural life and widowhood, and that the children were invested with a title to the remainder by operation of the conveyance and not as the representatives of the wife.—Wommack v. Whitmore, 448.

6. *Conveyances—Acknowledgments—Validity — Constructive notice.* — A deed good at common law is operative as to the parties thereto and those having actual notice thereof, although the acknowledgment of it may be worthless. The object of an acknowledgment is, that the deed may be admitted to record, and thus impart constructive notice to all persons of its contents.—(Caldwell vs. Head, 17 Mo., 561.)—Harrington v. Fortner, 468.

7. *Conveyances, how proved—Depositions—Formalities for record.*—A conveyance of land may be proved by the deposition of the grantor, with a copy of the conveyance annexed. The provisions of the statute, concerning the requisite formalities to be observed before a deed can be recorded, are applicable alone in cases where a registration of the deed is desired, and do not prevent the establishment of the execution of the deed by other modes of proof.—Id.

See Dower, 3, 4, 5; Husband and Wife, 3; Lands and Land-Titles, 2, 3; Mortgages and Deeds of Trust; Trusts and Trustees, 1.

CORPORATIONS.

1. *Eminent domain—Appropriation of land by corporation—Measure of damages.*—Where land is taken by a corporation and appropriated to its own use, the entire value of the lands is the proper measure of damages. And after receiving the full value, plaintiff cannot again interfere with the land or bring a new action.—Hickerson v. City of Mexico, 61.

See Account Stated, 3; Bills and Notes, 1 2; Corporations, Municipal; Court, County, 4; St. Louis, City of.

CORPORATIONS, MUNICIPAL.

1. *Corporations, municipal—Ordinance—Disturbing the peace—"Charivari."*—A city ordinance providing that "every person who shall willfully disturb the peace * * * by loud or unusual noise, by blowing horns, trumpets or other instruments, * * * or by any other device or means whatsoever, * * * shall be deemed guilty of a misdemeanor," is not violated by parties engaging in a "charivari," unless the effect is to disturb the peace and quiet of the citizens or some of them.—City of St. Charles v. Meyer, 86.

2. *Ordinance—Disturbing the peace—Evidence—Defense.*—In a prosecution for disturbance of the peace, testimony, to the effect that the peace of certain individuals was not disturbed, may be admissible for the purpose of weakening the force of the prosecutor's testimony touching the offensive character of the noises; but not as showing a specific defense.—Id.

3. *Constitution—Extension of city limits—Legislative power—Taxation.*—An act of the legislature enlarging the limits of a municipality, and thereby bringing within its area and subjecting to municipal taxes, against the owner's consent, farm property lying outside of the actual city limits, is not, by reason of such facts, unconstitutional. Such act is a proper exercise of legislative power and discretion.—Giboney v. Cape Girardeau, 141.

See Corporations, 3; Forest Park, 4.

COSTS; See Garnishment, 2.

COURTS, POWERS OF; See Forest Park, 1, 2.

COURT, ADAIR COUNTY PROBATE.

1. *Adair county Probate Court—Jurisdiction—Act of Feb.* 11, 1847.—The 3rd section of the act passed Feb. 11, 1847, had the effect of transferring to the Probate Court of Adair county all the jurisdiction relative to matters of probate and guardianship, which was conferred by the General Statutes upon County Courts.—Pattee v. Thomas, 163.

COURT, COUNTY.

1. *County Court—Agency as to matters of county and State—Township school fund—Remedy for misappropriations.*—The County Court is a trustee for the care and management of the township school funds. In this capacity it may, under certain circumstances, pay out money for which the township fund is manifestly liable, in order to avoid the expense of litigation. But if it err in so doing, the case is one of misappropriation by a trustee, for which the law has provided sufficient remedies, other than mandamus.—Township Board of Education v. Boyd, 276.

2. *Courts, County—Agency for State—Misappropriation—Responsibility.*—The County Court is also agent or trustee of the State for certain purposes in the general affairs of the county. The two agencies are distinct and independent, and there is no propriety in holding one agency, or the principal therein, responsible for a misappropriation committed in discharging the functions of the other.—Id.

3. *School funds—Misappropriation—Responsibility of county.*—If township school money be wrongfully paid out by the County Court, there does not arise any claim for re-imbursement out of the county treasury.—Id.

4. *Court, County, not a corporation—Misappropriation of school funds—Responsibility—Mandamus.*—A County Court is not a corporation capable of incurring a liability for misappropriation. Nor is mandamus admissible for enforcing a money demand founded upon alleged misappropriation of township school funds.—Id.

5. *County Court House—County justices—Building of by—Mandamus.*—Mandamus will not lie to compel the justices of a County Court to build a court house. The statute (Wagn. Stat., 403, § 4) leaves the erection of county buildings entirely to the discretion and judgment of the County Court, and such discretion cannot be controlled by mandamus.—State ex rel., v. Howell Co. Court, 583.

See Mandamus.

COURT HOUSE, COUNTY; See Courts, County, 5.

COVENANT; See Contracts; Conveyances; Dower, 3.

CRIMES AND PUNISHMENTS; See Practice, criminal.

CRIMINAL LAW; See Practice, criminal.

D.

DAMAGES.

1. *Damages for assault—Pecuniary condition of parties, etc., to be considered.*—In estimating damages caused by an assault and battery, the jury may take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness or atrocity, or want of atrocity, in the affair.—Dailey v. Houston, 361.

2. *Assault and battery—Action for—First assault—Nominal damages.*—In an action for assault and battery, where the answer simply denies the assault, plaintiff will be entitled at least to nominal damages, even though it appear from the evidence that plaintiff made the first assault.—Id.

3. *Damages—Measure of, for taking wood.*—Proper measure of damages for the taking of cord wood held to be the value of the wood with six per cent. interest from time of taking.—Charles v. St. L. & I. M. R. R. Co., 458.

See Breach of Promise, 1, 2, 3; Corporations, 3; Ejectment, 3; Evidence, 22, 23; Railroads, 1, 2, 3, 4, 5, 6, 7, 11; Sales, 1, 2.

DECEASED PERSONS; See Evidence, 18.

DEDICATION TO PUBLIC USE; See Forest Park, 2; Res adjudicata, 1.

DEMURRER; See Practice, Supreme Court, 10.

DEPOSITIONS; See Conveyances, 7; Evidence, 11, 12.

DESCENTS AND DISTRIBUTIONS.

1 *Descents and distributions—Life estate—Parent and child.*—Where a conveyance created a life estate in the grantor's wife, with a remainder to her children, such remainder becomes vested; and where one of the children married and died, leaving a husband and child living, and the child afterwards died, the husband, who survived, would, at the death of the tenant for life, as heir of his child, take the share his wife would have had in the property conveyed.—Wommack vs. Whitmore, 448.

DESCRIPTIO PERSONÆ; See Bills and Notes, 3; Practice, civil—Pleadings, 4.

DISTURBING THE PEACE; See Corporations, Municipal, 1; Practice, criminal, 1, 2.

DOWER.

1. *Dower—Personal Estate—Election—Death of widow.*—The 5th section of the Dower Act, (Wagn. Stat. 539) does not give to a widow any interest in the personal estate, unless she files her election in conformity with the 8th and 10th sections of the same act. And her death intervening can make no difference in the result.—Bryant, Adm'r, v. Christian, Adm'r, 98.

2. *Dower—Election—Personal estate—Administration.*—The administrator of a widow, whose husband had died without leaving a child or other descendant capable of inheriting, and who had filed no election under the 8th and 10th sections of the Dower Act, is not entitled to any distributive share in the personal estate of the husband—Id.

3. *Covenant—Incumbrances—Dower.*—An inchoate right of dower constitutes an incumbrance within the meaning of a covenant against incumbrances.—Durrett v. Piper, 551.

4. *Dower—Husband living—Release—Grant—Assignment.*—A wife's dower interest during the life of the husband is a mere possibility, which may be released, but cannot be the subject of grant or assignment.—Id.

5. *Dower—Articles of separation—Covenant of indemnity.*—In articles of separation, A. covenanted to indemnify B. against the claims of B.'s wife for alimony and dower. B. afterwards, to procure his wife's signature to a deed of land, was compelled to pay her money. *Held*, that B. had no claim against A. on this account.—Id.

6. *Ejectment—Mansion house of deceased, possession by wife—Dower—Assignment.*—In an action of ejectment for land whereon the mansion house of the deceased is situated, the widow, to whom dower has not been assigned, has such a possessory right as will defeat the action, and her right is capable of being assigned, and when assigned carries with it all the incidents belonging to it prior to its transfer.—Jones v. Manly, 559.

DRAM-SHOP.

1. *Dram-shop keepers—Selling to minors—Action on bond—Bond admissible in evidence without signature of sureties or approval of County Court.*—In suit on the bond of a dram-shop keeper, for selling liquor to a minor, the bond is admissible in evidence, even without the signatures of two sureties, or proof that it had been approved by the County Court.—Graves v. McHugh, 499.

2. *Dram-shop keepers—Bond, action on—Jurisdiction—Justices' courts.*—Under the statute concerning Dram-Shop Keepers, (Wagn. Stat., 552, § 20) an action by the parents of a minor, for the penalty of fifty dollars prescribed, may be brought before a justice of the peace; but a justice has no jurisdiction of a joint action against the dram-shop keeper and his sureties for a breach of the conditions of his bond, the amount of the bond being fifteen hundred dollars.Id.

See Liquors, sale of; Practice, criminal, 4.

DRUNKENNESS; See Practice, criminal, 11.

DUNKLIN CO. PATENT; See Practice, criminal, 3

E.

EJECTMENT.

1. *Practice, civil—Ejectment—Pleading—Judgment—Equity.*—In an action in ejectment, where defendant answered alleging that the deed under which plaintiff held was void, having been made upon a sale under the powers of a deed of trust, without sufficient notice being given of the sale as required by the deed; and plaintiff replied to the answer simply denying the new matter and asking no additional relief, the court could do no more than set aside the deed. It had no power to go further and order the payment by the defendant of taxes and the trust debt, or to order a foreclosure and sale in a manner not provided in the deed of trust.—White v. Rush, 105.

2. *Ejectment—Plaintiff must depend upon the strength of his own title.*—An instruction in an ejectment suit, that, if defendant wrongfully entered upon the premises, plaintiff must recover, is erroneous, as it makes the question of plaintiff's right depend only on the weakness of the defendant's title.—Cape Girardeau and Bloomington M. & G. R. Co. v. Renfroe, 265.

3. *Ejectment—Damages, measure of.*—The measure of damages for the detention of a building is not the amount plaintiff may have expended to provide another building in its place; it is the rents and profits down to the time of assessing the same.—Id.

4. *Ejectment—Equitable defenses—Mortgage, default on.*—In an action of ejectment the allegations of a default on the mortgage debt on said land is an equitable defense in favor of the mortgagee, or any one else in possession of the premises claiming under him, and, until satisfied, is a bar to the action. (Hubble vs. Vaughn, 42 Mo., 138.)—Harrington v. Fortner, 468.

5. *Evidence—Ejectment—Waste.*—In an action of ejectment evidence of waste is admissible. (Wagn. Stat., 560, § 13.) [Lee v. Bowman, 55 Mo., 400.]—Jones v. Manly, 559.

6. *Ejectment—Mansion house of deceased, possession by wife—Dower—Assignment.*—In an action of ejectment for land whereon the mansion house of the deceased is situated, the widow, to whom dower has not been assigned, has such a possessory right as will defeat an action, and her right is capable of being assigned, and when assigned carries with it all the incidents belonging to it prior to its transfer.—Id.

See Mortgages and Deeds of Trust, 13.

EMBEZZLEMENT; See Administration, 6, 7, 8.

EMINENT DOMAIN.

1. *Eminent domain—Appropriation of land by corporation—Measure of damages.*—Where land is taken by a corporation and appropriated to its own use, the entire value of the land is the proper measure of damages. And after receiving the full value, plaintiff cannot again interfere with the land or bring a new action.—Hickerson v. City of Mexico, 61.

See Forest Park, 2, 5, 6, 7.

EQUITY.

1. *Equity—Contracts—Specific Performance—Appraisement—Pleading—Account.*—A covenant in a lease, that at the end of the term the value of the improvements shall be ascertained by three appraisers to be chosen as provided in the lease, cannot be specifically enforced by a court of equity. But a petition, which alleges such covenant and seeks equitable relief, states a cause of action, as equity would have jurisdiction to have an account taken of the improvements.—Hug, Adm'x v. Van Burkleo, 202.

2. *Practice, civil—Specific performance—Suit for—Final decree in towns of over 40,000 people.*—In a county not having over forty thousand inhabitants, it is erroneous to render a final decree at the return term in a suit for specific performance.—Huff v. Shephard, 242.

EQUITY, continued.

3. *Equity—Specific performance—Contract to sell lands, etc.*—An agreement for the sale of lands, in which it is stipulated that the purchase money is to be paid "on such terms as may be agreed on between said parties," cannot be enforced in equity by a decree for specific performance.—Id.

See Administration, 12; Fraud; Mortgages and Deeds of Trust, 1, 2, 3, 4, 10, 11, 13, 14, 15, 21; Practice, civil—New trials; Practice, civil,—Pleadings, 7; Practice, Supreme Court, 3.

ESTOPPEL.

1. *Estoppel depends upon facts—Not a matter of law.*—The question of estoppel depends upon facts, and estoppel is not to be presumed as a matter of law until the facts are found.—Cape Girardeau & Bloomington M. & G. R. Co. v. Renfroe, 265.

EVIDENCE.

1. *Pleading—Admissions in, may be used in other suit, etc.*—Admissions contained in a pleading may be used against the party in another suit; and this, wholly regardless of the question, whether the person himself was in fact cognizant of the pleading. The act of the attorney in such case will be held to be the act of the party.—Downzelot v. Rawlings, 75.

2. *Partnership—Declarations of members will bind firm, when.*—While a partnership continues, the declarations of either of the partners made in respect to the business of the firm will bind it. But this power ceases with the dissolution.—Id.

3. *Account stated—Evidence—Assent.*—A petition to recover an alleged balance, found due upon settlement with the defendant, is not sustained by proof of the indebtedness concerning which the alleged settlement was made. It must appear that the defendant assented to the settlement or to to the balance found against him.—Cape Girardeau v. State Line R. R. Co. v. Kimmel, 83.

4. *Account stated—Evidence—Dissent of party*—An action upon account stated cannot be maintained where it appears that the defendant at the time dissented from the balance found, and claimed additional credit which was disallowed.—Id.

5. *Corporations—Minutes—Evidence—Stranger—Settlement.*—The minutes of the board of directors of a corporation are not competent testimony against an outside party to prove a settlement made with him by a committee.—Id.

6. *Practice, civil—Testimony of opposite party—How compelled.*—Sections 3, 7 & 9 of the act concerning witnesses, were intended to have the office and effect of the old chancery practice, in regard to interrogatories appended to a bill and to sift the conscience of the opposite party in like manner.—Eck v. Hatcher, 235.

7. *Notice—Party will be affected with, when put on inquiry.*—In suit to set aside the sale of land for fraudulent practices, the purchaser will be held to have knowledge thereof where the circumstances of the sale evidently required investigation and were such as to put him on inquiry.—Id.

8. *Evidence—Powers of attorney affecting land—Record of certified copies under § 40 of act touching evidence—Notice—Secondary proof, etc.— Constr. Stat.*—The 40th section of the statute relating to evidence, providing that certified copies, taken from county records, of "any writing, instrument or deed purporting to affect any real estate or any right or interest in the same," may be used in evidence under certain circumstances, was intended to embrace powers of attorney for the conveyance of land. But under that statute the record of such instrument can impart notice, and certified copies can be used as secondary proof of the original, only as to land situated in the county where the power of attorney was recorded. But such copy may be read in evidence to prove notice in fact, where the party is shown to be in possession of facts such as would have caused a man of ordinary prudence to examine the records where the instrument had been recorded.—Muldrow v. Robison, 331.

9. *Evidence—Notice, actual, question of fact*—The question of actual notice is one of fact, and to be determined like any other fact.—Id.

EVIDENCE, continued.

10. *Evidence—Notice—Facts which put on inquiry.*—One will be held to have notice of facts which would have been ascertained by a man of ordinary prudence and diligence.—Id.

11. *Evidence—Depositions—Certificate—Sufficiency of as to date of, taking.*—The caption of depositions began as follows: "State of North Carolina, Burke county, March 12th, 1873. Pursuant to notice heretofore served, the following depositions of witnesses produced, sworn and examined on this 12th day of March, 1873," and concluded with these words, "Given at the Post Office in Morganton, in Burke county, North Carolina, on the 12th day of March, 1873." *Held*, that it sufficiently appeared thereby that the depositions were taken on the 12th day of March, 1873.—Warlick v. Peterson, 408.

12. *Evidence—Depositions as to character—Admissibility—Impeachment of witnesses.*—In depositions offered to impeach the testimony of witnesses, the form of the question asked was, "Do you know A. B., if so, how long have you known him, and are you acquainted with his general character? If so, state what it is for truth and honesty?" The answers to the questions were full and explicit, and showed that the witnesses were testifying to the general character of A. B. at the place where he resided. The counsel of the opposing party was present and made no objection at the time to the questions or answers, but cross-examined the witnesses: *Held*, that the testimony was competent, notwithstanding the informality of the questions; it would be too late to object at the trial on account of the form of the questions.—Id.

3. *Evidence—Settlement—Rebuttal—Letters.*—In suit on a promissory note, defendant alleged settlement by the assignment to plaintiff of certain demands and also pleaded the bar of the statute of limitations. Plaintiff, in reply, set up a new promise, taking the case out of the statute. On the trial, defendant was sworn as a witness on his own behalf, and on cross-examination proved certain letters, written more than ten years prior to the institution of the suit, but after the alleged settlement, as having been written by himself. These letters were afterwards introduced by the plaintiff, to contradict defendant's testimony as to a settlement. *Held*, that the letters would not be competent to take the case out of the statute, but would be admissible to disprove the alleged settlement. If the witness had not been a party to the suit, the letters might not have been admissible to impeach his testimony, but as he was the defendant, the letters were admissible as his admissions.—Id.

14. *Evidence—Questions as to freedom from symptoms of disease.*—The question asked of a witness, whether a person was "in good health and free from symptoms of disease," is improper as involving a mere conclusion. The facts should be stated so that it could be seen on what the opinion was predicated.—Reid v. Piedmont & Arlington Life Ins. Co., 421.

15. *Insurance, life—Declarations of insured after issue of policy.*—Declarations of the insured as to his health, made after the issuing to him of a policy of life insurance, are not competent evidence.—Id.

16. *Insurance, life—Instructions—Evidence.*—An application for life insurance, which was made a part of the policy, contained the following question: "Name and residence of your own or family physician, or of the medical attendant who has last rendered you professional services?" This was answered "Have none." An instruction was offered on the trial in a suit on this policy declaring that "the plaintiff cannot recover, for the reason that deceased received medical attendance from a physician named, prior to the date of the application." *Held*, that the instruction was properly refused, because it undertook to tell the jury that they must find in a particular way, without regard to any testimony in the case but that of witnesses who supported the defendant's side.—Id.

17. *Practice, civil—New trials—Evidence, weight of—Duty of trial court.*—It is the duty of the trial court, in passing upon motions for new trials, to weigh the evidence; it has opportunities to see the witnesses; to form opinions as to their veracity; to observe whether they are biased or prejudiced; and can

EVIDENCE, continued.
also determine whether any improper influences operated on the jury in producing their verdict: and where the trial court is of the opinion, that the verdict is not supported by the evidence, or is against the weight of evidence, should never hesitate to grant a new trial.—Id.

18. *Evidence—Admissions of deceased persons, when competent.*—Statements of deceased persons, when in the nature of admissions, or made in connection with land in explanation of acts of the deceased, are competent evidence.—Stewart v. Glenn, 481.

19. *Administrator—Testimony of, as to embezzlement of notes of deceased—Witness act, etc.*—In suit against an administrator for embezzling and failing to inventory notes, given by him to the deceased, the administrator is not incompetent under the statute (Wagn. Stat., 1372-3, § 1). The issue in such a case is not a contract to which the deceased was a party, but the receipt and embezzlement or concealment of the notes by defendant.—Id.

20. *Administrator—Embezzlement of notes by—Notes must be in possession of—Constr. Stat.*—Under the statute (Wagn. Stat., p. 85, §§ 7, 8, 10 and 11) an action against an administrator, for concealing and embezzling notes, will not lie unless they are in his possession at the commencement of the proceeding.—Id.

21. *Evidence—Leading questions, admission of, no ground for reversal.*—The admission of leading questions is a matter resting very much in the sound discretion of the trial court, and cannot furnish ground for reversal.—Wilbur v. Johnson, 600.

See Breach of Promise, 1, 2; Condemnation of land, 3; Ejectment 5; Family Physician; Fraud, 1; Garnishment 1; Guardian and Ward, 7; Judgment, 5, 8; Negligence, 1, 2; Practice, civil—New trials, 1; Practice, criminal, 1, 2, 7; Practice, Supreme Court; Presumptions, 1; Res adjudicata, 2, 3, 4, 5; Revenue, 5, 6; Schools and School Lands, 1; Witnesses.

EXCEPTIONS; See Practice, civil—New Trials, 3; Practice, Supreme Court.

EXECUTION.

1. *Practice, civil—Justices' judgments—Return nulla bona—Execution from office of clerk of court.*—If, in a suit before a justice of the peace, a party to the suit becomes a non-resident of the county before judgment is rendered against him, it is not necessary to issue an execution against him and have it returned *nulla bona*, prior to the issue of an execution from the office of the clerk of the court in which the transcript is filed.—Harrington v. Fortner 468.

See Judgments, 3

F.

FAMILY PHYSICIAN; See Insurance, life, 1.

FENCES; See Railroads.

FOREST PARK.

1. *When courts may declare acts of legislature void.*—The courts cannot declare an act of the legislature void, no matter how unjust or impolitic it may be, unless it clearly conflicts with specific provisions of the constitution.—County Court of St. Louis Co. v. Griswold, 175.

2. *Taking private property for public use—Power of the courts to restrain the legislature.*—The courts have power to determine whether the use for which private property, authorized by the legislature to be taken, is in fact a public use, but if this question is decided in the affirmative, the judicial function is exhausted; the extent, to which such property shall be taken for such use, rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.—Id.

FOREST PARK, continued.

3. ——. *A park for the inhabitants of a county is a public use.*—The legislature of Missouri, authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county, located in the eastern portion of said county, near to, and outside of, the corporate limits of the city of St. Louis: *Held*, that this was a "public use," notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.—Id.

4. *Municipal indebtedness—Constitutional ordinance construed.*—That clause of the constitution of Missouri (Art. 11, § 14), which prohibits the general assembly from authorizing any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto—does not prohibit the legislature from authorizing a county to create a debt for the purpose of establishing a public park for the benefit of its inhabitants.—Id.

5. *Power of legislature to establish board of park commissioners.*—The legislature of Missouri has power to establish a board of park commissioners, one-half to be appointed by the county court, and one-half by the circuit court of the county, for the purpose of constructing and managing a park for the benefit of the inhabitants of the county.—Id.

6. *Taking private property for public use—Legislature may not arbitrarily fix value—Acts valid in part and void in part.*—An act, authorizing private property to be appropriated for the establishment of a public park, contained a proviso, "that, in all cases, the assessment of the county assessor for the year 1873 shall be taken as a guide in fixing the value of the property to be condemned or appraised:" *Held*, that if it was intended by this proviso, that the assessment made in 1873 should be taken as the measure or standard in fixing the value for compensation, then it would be clearly unconstitutional and void. "Property can only be taken or appropriated upon making just compensation. What is just is a matter of inquiry, ascertainable by either appraisers or a jury, upon evidence furnished in the case. No law can arbitrarily fix a value on property, and tell the owner he shall take that." But since an act may be valid in part and void in part, and since if this proviso were eliminated, there would still be adequate provisions in the act for its enforcement, *Held* also, that it may be rejected and the remaining portions of the act permitted to stand.—Id.

7. *Taking land for a public park—Vesting title in the "People of the County."*—An act of the legislature, providing that the title to land condemned for a public park shall vest in the "people of the county," is not void from the fact that the "people of the county" do not constitute any recognized legal or political body. The terms "people of the county," and "the county," may be regarded as interchangeable.—Id.

FRAUD.

1. *Evidence—Fraud—Intent.*—Very slight circumstances, apparently trivial and unimportant in themselves, when combined together, may afford irrefragable proof of fraudulent intent.—Hopkins to use, etc., v. Sievert, 201.

See Bills and Notes, 4, 5.

FRAUDS, STATUTE OF.

1. *Statute of frauds—Promise to marry, etc.*—Whether a verbal promise to marry, when not to be performed within one year, is within the statute of frauds, *Quære?*—Wilbur v. Johnson, 600.

G.

GARNISHMENT.

1. *Practice, civil—Pleadings—Garnishment—Prior garnishment—Evidence as to, when improper.*—In a garnishment proceeding, the garnishee cannot prove a prior garnishment to recover the same debt, where no such issue is presented by the pleadings.—Royer v. Fleming, 438.

GARNISHMENT, continued.

2. *Garnishment—Compromise of demand against garnishee, growing out of creditor's non-feasance—Fees and costs.*—A. was garnished, as debtor of B., on a contract for work and labor. In defense he showed that he had been called upon to pay certain debts owing by B. to his laborers, and had compromised them at 50 cents on the dollar: *Held*, that he could off-set against B.'s demand only the amount actually paid on such compromise. But if the terms of the compromise included fees and costs of the laborers, which were paid by A., and did not with the 50 cents exceed the amount due to the laborers by B., the fees and costs could be added to the off-set.—Id.

GUARDIAN AND WARD.

1. *Adair county Probate Court—Jurisdiction—Act of Feb.* 11, 1847.—The 3rd section of the act passed Feb. 11, 1874, had the effect of transferring to the Probate Court of Adair county all the jurisdiction relative to matters of probate and guardianship, which was conferred by the General Statute upon county Courts.—Pattee v. Thomas, 163.

2. *Guardianship—Derivation from father of minor's estate determined by court having jurisdiction.*—The question whether the estate of a minor was derived from his father, as affecting the right of the father, as natural guardian, to sell the estate of the minor, is one to be decided by the court having charge of the estate, and this having been decided by that court, proof to the contrary, at a subsequent period, will not affect the jurisdiction of the court.—Id.

3. *Guardians and curators—Minors, lands of—Sale at private sale—Probate Courts.*—Probate Courts have power to order the sale of lands of minors at private sale. This power was not taken away by the statute of 1851 and 1855, touching guardians and curators. (R. C. 1855, 826-7, §§ 25, 26, 27; McVey vs. McVey, 51 Mo., 406 cited and affirmed.)—Id.

4. *Guardianship—Sale of lands of minors—Inventory—Jurisdiction.*—The failure of the guardian to file an inventory, list and appraisement of his ward's property, does not deprive the Probate Court of jurisdiction, nor render void a sale made under the order of the court. (Overton vs. Johnson, 17 Mo., 442, cited and affirmed.)—Id.

5. *Guardianship—Minors, lands of—Private sale—Advertisement.*—Sections 24, 25 and 26, Rev. Code 1845, pp. 86, 87, requiring advertisement of sales of lands of minors, does not apply to private sales by a guardian.—Id.

6. *Guardianship—Minors, lands of—Sale—Notice.*—The administration law of 1851 did not require notice of sale of lands of minors by their guardians to be given, as in case of sales of lands by administrators.—Id.

7. *Guardianship—Lands of minors, sale of—Approval by court.*—The records of a Probate Court, showing a report of a sale of lands of minors by the curator, and his oath thereto, and an entry showing that the court received the report, and ordered the curator to account for the proceeds according to law, is sufficient evidence of approval of the sale.—Id.

8. *Judicial sales—Irregularities—Title of purchaser.*—Slight irregularities are not sufficient to overturn the title of a purchaser at a judicial sale, where the court had power to order the sale, and there is no pretense of fraud, especially after the lapse of a long period of time.—Id.

II.

HANNIBAL COURT OF COMMON PLEAS.

1. *Practice, civil—Jurisdiction—Residence of parties—Hannibal Court of Common Pleas.*—The provision of the Practice Act, that "when there are several defendants and they reside in different counties, the suit may be brought in any such county," (Wagn. Stat., 1005, § 1), applies to the Hannibal Court of Common Pleas, if one or more of the defendants reside in Miller or Mason township, Marion county.—Stillwell v. Craig, 24

HUSBAND AND WIFE.

1. *Conveyances in blank—Power of married woman to delegate authority to fill up deed.*—A person competent to convey his real estate, may sign and acknowledge the deed in blank, and deliver the same to an agent with authority to fill up the blank and perfect the conveyance. But a married woman can make no such conveyance of her separate estate, having no authority to delegate such powers.—McQuie v. Peay, 56.
2. *Married woman—Power to mortgrge separate estate.*—The wife has, in equity, the same power over her separate estate as a *feme sole*, and may bind it by mortgage or deed of trust.—Id.
3. *Husband and wife—Conveyance secured by wife from husband's funds—Advancement.*—A conveyance of land which a wife secures to herself in her own name, with her husband's funds, will be presumed to be an advancement for her benefit. But whether such be the fact is a question of intention, and evidence on that point is admissible, especially where the husband denies such intention. And *semble*, that fraud, in any form, in obtaining the title against his consent, will itself rebut the presumption.—Darrier v. Darrier, 222.
4. *Husband and Wife—Competent witnesses, where opposing parties—Agency of wife.*—In suit by the husband against the wife, to divest the latter of title to land, the parties are competent witnesses against each other in regard to communications between them. And the agency of the wife having been satisfactorily established, the same rules of evidence will prevail as between any other principal and agent.—Id.
5. *Husband and wife, confidential communications between.*—A letter from a husband to his wife, directing her to purchase certain land for him, may be introduced in evidence, and does not fall within the rule which forbids the disclosure of confidential communications.—Id.
6. *Practice, civil—Suit by married woman—Allegation as to marriage of plaintiff—Defect in—Amendment after verdict.*—In suit by the wife, although the allegations of her marriage at the time when the cause of action accrued may be technically insufficient, yet if the evidence shows the fact, and the defect did not mislead the jury, it may be cured by amendment after verdict.—Dailey v. Houston, 361.
7. *Practice, civil—Misjoinder of actions—Defect waived by failure to plead.*—A joinder in the same court of a claim for injuries done the wife, and a claim for consequent loss of services on the part of the wife to the husband, etc., is error; but the defect, if not taken advantage of by demurrer or answer, is deemed to be waived. (Wagn. Stat., 1015, § 10.)—Id.
8. *Husband and wife—Joint trespass by—Wife not liable.*—The general rule seems to be that no joint action will lie against the husband and wife for their joint trespass, but the husband alone is liable. The wife is presumed to be under duress of the husband, and cannot be held where such act is done in his presence or in connection with him. But where the petition charges that the trespass was committed by the wife alone, and contains no allegation that the husband committed the trespass, or that he was present, this doctrine cannot be invoked.—Id.
9. *Practice, civil—Witnesses—Married woman.*—The marriage of a plaintiff pending her suit, will not render a woman incompetent as a witness.—Charles v. St. L. & I. M. R. R. Co., 458.

See Dower; Judgment, 4.

I.

INDIANS; See Marriage, 1, 2.

INDICTMENT; See Practice, criminal.

INFANTS; See Dram-shops, 1, 2; Guardian and Ward; Railroads, 4; Witnesses, 2, 3.

INSANITY; See Wills, 8.

INSTRUCTIONS; See Practice, civil—Trial; Wills, 9. 15.

INSURANCE, LIFE.

1. "*Family physician*"—*Phrase defined, not technical.*—The phrase, "family physician," is one that is in common or ordinary use, and has no particular, definite or technical signification. It signifies one who usually attends and is consulted by the members of a family in the capacity of a physician; it means one who is accustomed to attend, and not one who has occasionally attended.—Reid v. Piedmont & Arlington Life Insurance Co., 421.

2. *Evidence—Questions as to freedom from symptoms of disease.*—The question asked of a witness, whether a person was "in good health and free from symptoms of disease," is improper as involving a mere conclusion. The facts should be stated so that it could be seen on what the opinion was predicated.—Id.

3. *Insurance, life—Declarations of insured after issue of policy.*—Declarations of the insured as to his health, made after the issuing to him of a policy of life insurance, are not competent evidence.—Id.

4. *Insurance, life—Instructions—Evidence.*—An application for life insurance, which was made a part of the policy, contained the following question: "Name and residence of your own or family physician, or of the medical attendant who last rendered you professional services?" This was answered, "Have none." An instruction was offered on the trial in a suit on this policy, declaring that "the plaintiff cannot recover, for the reason that deceased received medical attendance from a physician named, prior to the date of the application." *Held*, that the instruction was properly refused, because it undertook to tell the jury that they must find in a particular way, without regard to any testimony in the case but that of witnesses who supported the defendant's side.—Id.

INTEREST.

1. *Interest.*—Six per cent. interest only can be allowed, except where a different rate is contracted for between the parties or fixed by the statute.—Ownby v. Ely, 475.

See Bills and Notes.

J.

JEOFAILS; See Practice, civil—Pleadings, 2.

JUDGMENT.

1. *Judgments, may be amended nunc pro tunc, how.*—The established rule in this State is that in all cases where it is attempted to amend a judgment *nunc pro tunc* the record must show the facts which authorize the entry.—Dunn v. Raley, 134.

2. *Judgments, setting aside of—Power of court.*—Courts may, in their discretion, set aside a final judgment at any time during the term at which it is rendered, on motion and *ex parte* affidavits.—Randolph v. Sloan, 155.

3. *Administrator, judgment against, in Circuit Court—Motion to quash execution—Appeal from, etc.*—In this State a judgment against an administrator rendered in the Circuit Court, will not authorize an execution in that tribunal, but must be executed by a proceeding in the Probate Court. But, *semble*, that in case of appeal from judgment rendered on motion to quash such execution, and in the absence of any appeal or writ of error from the judgment in the cause, the Supreme Court will not interfere.—Wernecke v. Wood, 352.

4. *Married women, judgment against.*—A judgment against a married woman is a nullity.—Id.

5. *Judgments—Erroneous entries—Corrections nunc pro tunc, at subsequent term—Evidence sufficient to authorize—Presumption.*—The rule is well settled in this State, that where the clerk of a court fails to enter a judgment, or enters up a wrong judgment, the court has the power to correct the error or omission by having the proper judgment entered up by the clerk, at any time at the same or a subsequent term. But in cases where *nunc pro tunc* entries are made, the record should in some way show, either from the judge's minutes or

JUDGMENT, continued.

otherwise, the facts which would authorize the entry. Where a judgment is entered *nunc pro tunc* by order of the court, the presumption is in favor of the action of the court, and that it was based upon sufficient evidence.—Fletcher v. Coombs, 430.

6. *Judgment—Superfluous matter.*—It is proper to strike superfluous matter from a judgment so that a proper judgment may be left.—Royer v. Fleming, 438.

7. *Judgments—Persons not parties to record not affected.*—The interests of persons, not parties to the record, cannot be affected by the judgment in the case. —Wommack vs. Whitmore, 448.

8. *Practice, civil—Evidence—Reversal.*—Judgment will not be reversed for an error as to evidence, which works no prejudice.—Charles v. St. L. & I. M. R. 458.

See Arbitration and Award, 1; Executions, 1; Practice, civil—Pleadings, 2; Practice, civil—Trials, 13; Res adjudicata, 7.

JURISDICTION; See Court, Adair County Probate; Dram-shops, 1, 2; Hannibal Court of Common Pleas, 1; Justices' Courts, 1, 2, 3; Practice, civil, 1.

JURY; See Practice, civil—Trials; Practice, criminal, 9; Wills, 9, 14, 15.

JUSTICES' COURTS.

1. *Damages—Action before a justice for killing stock and injuries to harness—Jurisdiction as to amount.*—Where suit is brought before a justice of the peace against a railroad company, combining a claim for killing a horse with a claim for injuries to the harness, it must be instituted under sub-division 3, of § 3, Art. I, of the act touching justices of the peace; (Wagn. Stat., 808-9.) and judgment for the combined injuries must be limited to fifty dollars. Such suit cannot be brought under sub-division 5, for killing the horse, and in the same suit also under sub-division 3, for damage to the harness.—Dillard vs. St. L., K. C. & N. R. R. Co., 69.

2. *Justices' courts, jurisdiction of.*—Justices' courts cannot exercise any jurisdiction except that conferred by statute.—Id.

3. *Justices' courts—Jurisdiction as to amount—Motion to dismiss in Circuit Court.*—Where the judgment rendered by a justice exceeds his jurisdiction, the case may be dismissed on motion in the Circuit Court.—Id.

4. *Justices' courts—Statement—Sufficiency.*—No technical pleadings are required to be filed in a justice's court, and though the statement filed may not show in direct terms the facts necessary as a foundation for the action, yet if they are inferable from the statement, this will be sufficient, at least after verdict. —Woods v. St. L., K. C. & N. R. R. Co., 109.

5. *Practice, civil—Justices' judgments—Return nulla bona—Execution from office of clerk of court.*—If, in a suit before a justice of the peace, a party to the suit becomes a non-resident of the county before judgment is rendered against him, it is not necessary to issue an execution against him and have it returned *nulla bona*, prior to the issue of an execution from the office of the clerk of the court in which the transcript is filed.—Harrington v. Fortner, 468.

6. *Justices of the peace, proceedings of—Titles—Judicial sales.*—Proceedings before justices of the peace should never be viewed with technical nor hypercritical nicety, especially when they are made the bases of titles arising from judicial sales.—Id.

7. *Justice's Court—Appeal from verdict in, no ground for dismissal.*—In justices courts a verdict is equivalent to a judgment, and an appeal taken from a verdict instead of a judgment in such court, although not a literal, is a substantial compliance with the law, and will not be dismissed on account of such technical irregularity.—Munday vs. Clements, 577.

See Dram-shops, 2.

L.

LAND AND LAND TITLES.

1. *Notice—Party will be affected with, when put on inquiry.*—In suits to set aside the sale of land for fraudulent practices, the purchaser will be held to have knowledge thereof where the circumstances of the sale evidently required investigation and were such as to put him on inquiry.—Eck v. Hatcher, 235.

2. *Land and land titles—Conveyances—Record—Act of Feb. 2, 1847.*—The Act "to quiet vexatious land litigation," approved Feb. 2, 1847, was not designed to defeat a title regular in every particular, acquired in good faith and for a valuable consideration, but simply to make deeds, which theretofore were valid between the parties, operate from and after the passage of the act as constructive notice, as though they had been correctly proved or acknowledged when recorded.—Gatewood v. Hart, 261.

3. *Evidence—Powers of attorney affecting land—Record of certified copies under § 40 of act touching evidence—Notice—Secondary proof, etc.— Constr. Stat.*—The 40th section of the statute relating to evidence, providing that certified copies, taken from county records, of "any writing, instrument or deed purporting to affect any real estate or any right or interest in the same," may be used in evidence under certain circumstances, was intended to embrace powers of attorney for the conveyance of land. But under that statute the record of such instrument can impart notice, and certified copies can be used as secondary proof of the original, only as to land situated in the county where the power of attorney was recorded. But such copy may be read in evidence to prove notice in fact, where the party is shown to be in possession of facts such as would have caused a man of ordinary prudence to examine the records where the instrument had been recorded.—Muldrow v. Robison, 331.

See Administration, 12; Condemnation of Land, 1; Conveyances; Descents and Distributions, 1; Guardian and Ward, 8; Partition, 1.

LANDLORD AND TENANT; See Equity, 1; Sales, 1.

LEGISLATURE, POWER OF; See Forest Park, 1, 2, 5, 6.

LEGITIMACY; See Wills, 15.

LEVY.

1. *Examination—Levy—Actual seizure or declaration of intention—Debtor, notification to.*—To constitute a levy, lawful as to third persons, there must be an actual as distinguished from a constructive seizure by the officer; or an oral assertion by him, that a levy is intended; and *semble*, that the proceeding should be known to and acquiesced in by the debtor; or, at all events, such as not to leadto an inference of intentional concealment thereof by the officer.—Douglas v. Orr, 573.

LICENSE; See Dram-shop; Liquors, sale of.

LIEN, MECHANIC'S; See Mechanic's Lien.

LIEN, VENDOR'S; See Vendor's Lien.

LIMITATIONS.

1. *Limitations—Promissory note—Mortgage.*—A note or bond may be barred by limitation, and yet a mortgage securing its payment may be enforced against the land mortgaged.—Cape Girardeau v. Harbison, 90.

2. *Limitations—Administrator—New promise.*—An administrator cannot, by a new promise, take a debt of his intestate out of the statute of limitations.—Id.

3. *Limitations—Presumption of payment—Distinction—Mortgage.*—The defense of the statute of limitations, and that of presumption of payment arising from lapse of time, are distinct in their natures and incidents. There is no statute of limitations applicable to foreclosure of a mortgage, but the presumption of payment, by analogy in certain cases, operates with like effect.—Id.

LIMITATIONS, continued.

4. *Limitations—Real estate—Adverse possession—Mortgage.*—The defense of limitation against the recovery of real estate requires an adverse possession to support it. And no such adverse possession exists in a mortgagor, as against the mortgagee, so long as their original relations continue to subsist. —Id.

5. *Limitations—New promise to a stranger—Admissions—Presumptions.*—A new promise or acknowledgment made to a stranger will not take a debt out of the statute of limitations. But as an admission of fact against the interest of the person making it, it may be evidence sufficient to rebut the presumption of payment arising from lapse of time.—Id.

6. *Evidence—Settlement—Rebuttal—Letters.*—In suit on a promissory note, defendant alleged settlement by the assignment to plaintiff of certain demands and also pleaded the bar of the statute of limitations. Plaintiff, in reply, set up a new promise, taking the case out of the statute. On the trial, defendant was sworn as a witness on his own behalf, and on cross-examination proved certain letters, written more than ten years prior to the institution of the suit, but after the alleged settlement, as having been written by himself. These letters were afterwards introduced by the plaintiff, to contradict defendant's testimony as to a settlement. *Held*, that the letters would not be competent to take the case out of the statute, but would be admissible to disprove the alleged settlement. If the witness had not been a party to the suit, the letters might not have been admissible to impeach his testimony, but as he was the defendant, the letters were admissible as his admissions.—Warlick v. Peterson, 408.

7. *Limitations—Acknowledgment of debt—What sufficient.*—In a suit on a promissory note, where the defendant relied upon the statute of limitations, a letter from defendant to plaintiff, which referred in clear terms to a note made by the debtor to the plaintiff, which remained unpaid, and promised to keep for the plaintiff all he could make over the amount necessary to support his family, was a sufficient acknowledgment to take the case out of the statute of limitations, if written within the time limited by the statute; provided it referred to the particular note in suit. Whether the promise referred to this note was a question of fact for the jury.—Id.

8. *Limitations—Acknowledgment—Sufficiency of, question for court.*—The sufficiency of an acknowledgment to remove the bar of the statute of limitations is a question to be passed upon by the court.—Id.

LIQUORS, SALE OF.

1. *Liquors, selling of—License by city council does not relieve from obligation to pay county license.*—When a town or city charter does not exclude the right of the County Court to demand a license, a license from the city or town will not relieve from the obligation to obtain one from the county.—State v. Harper, 530.

See Dram-shop.

M.

MANDAMUS.

1. *Mandamus—Plats and surveys of county roads made by private citizen—Failure of to deliver, etc.*—Mandamus will not lie to compel a mere private person, not acting in any official capacity, to deliver to the county clerk a book of surveys and plats of the county roads, although the plats and surveys were made under order of the court and paid for by the county.—State ex rel. Cooper County v. Trent, 571.

See Courts, County, 4, 5.

MARRIAGE.

1. *Marriages with Indians, what sufficient.*—Under the customs of Indian tribes when a messenger was sent by the intended bridegroom to the parents of the bride, with a proposal to take her as his wife according to the Indian custom,

MARRIAGE, continued.

and with presents to the parents, and the parents had signified their acceptance, and the bride, with their consent, had returned and cohabited with the suitor, these facts would constitute a valid marriage.—Boyer v. Dively, 510.

2. *Marriages with Indians—Marriages according to Indian customs valid, although the tribe might reside in the State of Missouri—Constitution of the United States.*—The Constitution of the United States, and the statutes passed in pursuance thereof, recognize the Indians as a peculiar people, having relations to the Government totally different from citizens of the States. And although located within State lines, yet, so long as their tribal customs are adhered to and the Federal Government manages their affairs by agent, they are not regarded as subject to the laws, at least so far as marriages and inheritance are concerned. The Constitution of the United States especially authorizes Congress to regulate commerce with the Indian tribes as with foreign nations. The customs and laws of the Indians then prevailed among the remnants of tribes located in this State in 1829 and 1830, and would continue unless positively changed by the Legislature of the State, and no such legislation has ever been attempted. A marriage, therefore, among them according to their custom, would for the purpose of inheritance, at least, be valid.—Id.

MARRIED WOMEN ; See Husband and Wife.

MECHANIC'S LIEN.

1. *Mechanic's lien—Indiscriminate payments, when discharge the lien.*—In suit on a mechanic's lien, when it appears that the contractor was indebted to plaintiff on buildings other than the one described in the petition, and that payments were made on the general account, and not on that of any particular building, the lien is not thereby discharged, unless the payments are sufficient to discharge all the debts. The effect of such payments would depend upon the application made by the contractor, at the time of payment, or in default of such application then upon that made by plaintiff at that time; or if no application were made by either, then the law would apply the payments as justice and equity might require.—Gantner v. Kemper, 567.

MORTGAGES AND DEEDS OF TRUST.

1. *Administrator, sale by—Purchase by administrator at, will be held in trust for estate, when.*—The statute, requiring the appraisement of land held by an administrator before he can purchase the same, has no application to his purchase of land sold under deed of trust given by the decedent. But he cannot in such case speculate on the interests of the creditors and distributors of the estate, and sacrifice them to his own individual interest. Such a purchase would be presumed to be for the benefit of the estate; and at all events would be closely examined by a court of equity, if questioned by those interested in the estate.

And where it appeared, that although nominally made by the trustee named in the deed of trust, the sale was in fact prompted by the administrator, the latter would be regarded in a court of equity as the vendor, and his purchase would be held to have been made in trust for the benefit of the estate.—Harper v. Mansfield, 18.

2. *Mortgage and deed of trust—Sale—Trustee must be present, etc.*—The trustee in a deed of trust must be present in person at the trust sale and watch over it, and adjourn the sale, if necessary, in order to prevent a sacrifice of the property. And no one can do it in his stead, unless empowered in the instrument conferring the trust. (Graham vs. King, 50 Mo., 24.)—Id.

3. *Deeds of trust—Failure to name trustee—Effect of deed in equity.*—The failure to insert the name of the trustee in a deed of trust, when in other respects the instrument is complete, although at law it makes the deed inoperative, does not wholly vitiate it. The deed will nevertheless be regarded as an equitable mortgage, and held to create a lien for the benefit of the creditor, which may be enforced in equity. And the assignee of the note will be subrogated to all the rights and equities of his assignor.—McQuie v. Peay, 56.

MORTGAGES AND DEEDS OF TRUST, continued.

4. *Married woman—Power to mortgage separate estate.*—The wife has in equity the same power over her separate estate as a *feme sole*, and may bind it by mortgage or deed of trust.—Id.

5. *Limitations—Promissory note—Mortgage.*—A note or bond may be barred by limitation, and yet a mortgage securing its payment may be enforced against the land mortgaged.—Cape Girardeau Co. v. Harbison, 90.

6. *Limitations—Presumption of payment—Distinction—Mortgage.*—The defense of the statute of limitations, and that of presumption of payment arising from lapse of time, are distinct in their natures and incidents. There is no statute of limitations applicable to foreclosure of a mortgage, but the presumption of payment, by analogy in certain cases, operates with like force.—Id.

7. *Limitations—Real estate—Adverse possession—Mortgage.*—The defense of limitation against the recovery of real estate requires an adverse possession to support it. And no such adverse possession exists in a mortgagor, as against the mortgagee, so long as their original relations continue to subsist.—Id.

8. *Limitations—New promise to a stranger—Admissions—Presumptions.*—A new promise or acknowledgment, made to a stranger will not take a debt out of the statute of limitations. But as an admission of fact against the interest of the person making it, it may be evidence sufficient to rebut the presumption of payment arising from lapse of time.—Id.

9. *Mortgage—Foreclosure—Administration—Allowance of demand.*—In a proceeding for foreclosure against a purchaser of the land, it is not necessary to show that the debt has been allowed against the estate of the deceased mortgagor.—Id.

10. *Mortgage—Seal, irregularity in—Deed may be enforced notwithstanding, in equity.*—A mortgage may be irregular where the seal is omitted or not in accordance with law, but it will nevertheless be valid to create a lien, a trust for the benefit of creditors, which can be enforced in equity; and even where suit is brought at law to foreclose the mortgage, it will not be reversed simply for such defect.—Dunn v. Raley, 134.

11. *Mortgage, suit on—Prior encumbrancer made party defendant—How far concluded thereby from suit on first mortgage—Res adjudicata—R. C.* 1855—*Construed statutes.*—In suit brought to foreclose a mortgage, while the statute of 1855 in relation to mortgages was in operation (See § 7), plaintiff had a prior encumbrancer made one of the parties defendant. But the petition did not ask that plaintiff might have the privilege of paying off his claim and be subrogated to his rights, nor that said claim should be first satisfied in order that a clear title might be obtained upon a sale. Upon these matters the judgment was also silent. *Held* that such suit did not constitute a bar to further proceedings by the first encumbrancer on his mortgage. Although technically made a party his rights were unaffected.—Id.

12. *Mortgages—Not expressed to be sealed, good in equity—Title acquired under, defense to suit in ejectment under later deed, etc.*—An instrument in the nature of a mortgage with power of sale, not expressed to be sealed, may be good as an equitable mortgage; and a title acquired from a sale under it will be a good defense in ejectment against a deed of later date, which was not filed for record until long after the transfer under the mortgage, accompanied by change of possession.—Jones v. Brewington, 210.

13. *Mortgage—Taking of new note, effect of as to release*—Where a note is secured by a mortgage, the taking of a new note does not of itself operate as a discharge of the lien. Nothing short of an actual payment of the debt itself, or an express release, will have that effect.—Lippold v. Held, 213.

14. *Mortgages—Parol agreement as to priority of securities—Effect of, on assignees—Vendor's lien, etc.*—Certain land was sold, and notes secured by mortgage given for the purchase money which was duly recorded. The purchaser afterwards sold the same tract at an advanced price, and received notes for a sum equal to the original purchase money secured by mortgage and further notes for the advance price secured by a second mortgage of same date. Then, in

order to relieve himself of all responsibility on his notes given for the original purchase money, his vendor surrendered said notes and discharged the mortgage given to secure them, and accepted the notes given by the second purchaser in their place, it being agreed that they should be substituted in lieu of the notes so surrendered, and also that they should be satisfied out of the property before those given to the first purchaser for the advance price. The last named notes matured first, and suit being brought against the first purchaser by a third party, to whom they were transferred, upon said notes, and to foreclose the mortgage; *held*—1st—that the parol agreement for the substitution might be shown in evidence. It would not have the effect of modifying or changing the written instrument; 2nd—that the holder took the notes subject to that agreement, and to the equities created thereby, whether he had notice of the same or not. The doctrine of prior equities applicable to commercial paper would not govern in such a case, the question being as to the priority of securities. 3rd.—That the original purchaser would retain his vendor's lien notwithstanding the discharge of the mortgage. The vendor in receiving a mortgage to secure the purchase money does not lose his original lien by its merger in the mortgage.—Linville v. Savage, 248.

15. *Mortgages—Seals, lack of—Acknowledgment—Record.*—A mortgage, though lacking a seal, is still good as an equitable mortgage, and if acknowledged and recorded imparts notice with equal efficiency as if sealed.—(McClurg vs. Phillips, 57 Mo., 214.)—Harrington v. Fortner, 468.

16. *Ejectment—Equitable defense—Mortgage, default on.*—In an action of ejectment the allegation of a default on the mortgage debt on said land is an equitable defense in favor of the mortgagee, or any one else in possession of the promises claiming under him, and, until satisfied, is a bar to the action. (Hubole vs. Vaughn, 42 Mo., 138.)—Id.

17. *Partnership—Personal property, mortgage of—Execution—Acknowledgment.*—Under our statute which requires mortgages of personal property to be acknowledged as conveyances of land are by law required to be acknowledged, a mortgage by a partnership may be signed by any one of the partners with the firm name, and a partner, whose name does not appear in the style of the firm, may so sign the deed and acknowledge it.—Keck v. Fisher, admr. 532.

18. *Contract—Mortgage—Power of Sale—Error obvious on face of instrument—How construed.*—A mortgage with power of sale recited that in case of default in payment of the mortgage debt "the party of the first part," (who according to the phraseology of the deed was the mortgagor,) should proceed to sell, and provided further, that the mortgagee, naming him, should apply the proceeds. *Held*, that the intention was to confer a power of sale on the mortgagee, and that the error was an obvious one on the face of the instrument; and that therefore it did not require for its removal the introduction of external evidence.—Gaines v. Allen, 537.

19. *Agency—Mortgage, sale under—Disability of mortgagee to purchase attaches to his agent.*—The same disability as to purchase at the mortgage sale attaches to the agent of the mortgagee for the collection of the debt as to the mortgagee himself.—Id.

20. *Mortgages—Sales by marshal—Agency—Right of mortgagee to purchase.*—Where a mortgage provides that the sale in case of default may be made by the mortgagee, or in case of his refusal to act, by the marshal, the mortgagee and marshal are, for the purposes of making the sale, co-trustees, and the mortgagee cannot, by refusing to make the sale, and thereby procuring it to be made by the marshal, relieve himself of his disability to purchase at the sale.—Id.

21. *Mortgages—Purchase at sale by mortgagee—Equity of redemption.*—It is the settled law that where a mortgagee buys the property at a sale under the power given in the mortgage, the equity of redemption still subsists in the mortgagor.—Id.

MORTGAGES AND DEEDS OF TRUST, continued.

22. *Deed of trust—Acknowledgment before trustee—Deed as inter partes.*—Although the acknowledgment of a deed of trust, taken before one who is trustee in the instrument, is worthless, yet the deed is valid between the parties.—Black v. Gregg, 563.

23. *Deed, acknowledgment of—Registration—Notice, etc.*—The acknowledgment of a deed becomes necessary principally in order to obtain registration, for the purpose of imparting notice to third parties.—Id.

24. *Deed of trust, sale of land under, while maker was in Southern army—Bill to set aside, etc.*—A bill in equity will not lie to redeem lands sold under a deed of trust, on the ground that the maker was, when the land was sold, in the so-called Confederate service, and held as a prisoner by the United States Government, where it further appears that he had voluntarily entered the Southern army. (DeJarnette vs. DeGiverville, 56 Mo., 440, affirmed.)—Napton & Hough, J. J., Dissenting.—Id.

See Administration.

N.

NATIONAL BANKS; See Revenue, 1.

NEGLIGENCE.

1. *Negligence—Question of law to be passed upon by court; of fact by the jury.*—Although in many cases where the facts from which negligence is to be inferred are undisputed, the question of negligence is one of law to be passed upon by the court, yet if the facts are disputed and the evidence conflicting, the question should always be left to the jury.—Owens v. Hann. & St. Joe R. R. Co., 386.

2. *Damages—Negligence—Burden of proof.*—In actions for damages arising from alleged negligence, the burden of proof is always on the plaintiff.—Id.

See Railroads, 3, 8, 9, 12.

NEW PROMISE; See Limitations.

NEW TRIAL; See Practice, civil—New Trials.

NON-RESIDENT; See Executions, 1; Revenue, 2.

NOTICE; See Conveyances, 6; Evidence, 7, 8, 9, 10; Guardian and Ward, 5, 6; Partnership, 1.

O.

ORDINANCE; See Corporations, Municipal, 1, 2.

P.

PARK; See Forest Park.

PARTITION.

1. *Partition—Action of, can not be maintained against one in exclusive possession—Such exclusive possession must amount to actual ouster.*—An action in partition cannot be maintained by one out of possession against one who is in actual exclusive possession of the land, asserting an exclusive title thereto. But in such cases, disseizin or an adverse possession, amounting to an actual ouster, must be shown in order to destroy the right to such action; and where it appeared that the ancestor from whom both parties derived title had a life estate in the land, and was entitled to its possession to the time of her death, and had granted to a tenant a lease of the land, which was unexpired at the time of her death, and, that after her death the defendant, as her administrator, collected the rents, and paid the taxes; and that defendant never recognized plaintiff as having any claim on the land, and that during three months, which elapsed between the death of the ancestor and the bringing of the suit in partition, plaintiff never applied for or received any part of the rent: *Held*, that these facts did not constitute such an adverse holding as to amount to an ouster.—Wommack v. Whitmore, 448.

PARTNERSHIP.

1. *Partnership—Dissolution—Notice of, when necessary—Member suffering name to remain in firm.*—As to persons who have had no previous dealings with or knowledge of a firm, or of those who composed it, no notice of its dissolution is necessary in order to prevent liability in consequence of subsequent debts or engagements from attaching to the partner who has retired. If, however, a former partner suffers his name to appear as still belonging to a firm from which he has retired, he will be held liable to any one, who, by his conduct in this particular, has been misled into giving credit to the firm. And this will be the case whether notice be given by publication or not.—Dowzelot v. Rawlings, 75.

2. *Partnership—Declarations of members, will bind firm, when.*—While a partnership continues the declarations of either of the partners made in respect to the business of the firm will bind it. But this power ceases with the dissolution.—Id.

3. *Administration—Probate Court—Appeal—Partnership estate.*—An appeal lies to the Circuit Court from the judgment of the Probate Court, on a proceeding by the administrator of a deceased partner, citing the surviving partner to show cause why he should not turn over property to the administrator.—McCrary, Adm'r v. Menteer, 446.

4. *Partnership—Rights of partners as to disposition of partnership property—Agency.*—Each member of the partnership, as to the property and business of the firm, is the agent of all the others, and has full power and authority to sell, pledge or otherwise dispose of any effects belonging to the firm for any purpose within the scope of the partnership. (Clark vs. Rives, 33 Mo., 579, affirmed.) This rule does not apply to real property; in conveying it each member of the firm must join.—Keck v. Fisher, Adm'r, 532.

5. *Partnership—Personal property, mortgage of—Execution—Acknowledgment.*—Under our statute, which requires mortgages of personal property to be acknowledged as conveyances of land are by law required to be acknowledged, a mortgage by a partnership may be signed by any one of the partners with the firm name, and a partner, whose name does not appear in the style of the firm, may so sign the deed and acknowledge it.—Id.

PRACTICE, CIVIL.

1. *Practice, civil—Application raising question of jurisdiction, no appearance.*—A rule of court, which prescribes that "application to the court to raise any jurisdictional question shall be deemed an appearance" for other purposes, is invalid. Jurisdiction over the person can only be acquired by the method which the law provides, or by consent of the party.—Huff v. Shephard, 242.

See Hannibal Court of Common Pleas; Justices' Courts; Process.

PRACTICE, CIVIL—ACTIONS; See Administration, 7, 8; Damages, 2; Ejectment; Mechanic's Lien; Replevin.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—Petition for review—Unauthorized appearance of counsel.*—Where there has been no personal service upon defendant and no appearance on his behalf of counsel thereto authorized by him, he has three years from date of the judgment, within which to petition for review.—Randolph v. Sloan, 155.

2. *Bills of exceptions, when must be signed—Time, how waived.*—Bills of exceptions must be signed and appeals perfected during the term at which the cause is disposed of. A party having the right to insist on this rule may waive it, but the waiver must appear either by an entry of record or a stipulation filed.—Smith v Pollock, 161.

See Administration, 5; Practice, Supreme Court.

PRACTICE, CIVIL—NEW TRIALS.

1. *Practice, civil—New trial—Newly discovered evidence.*—A new trial on the ground of newly discovered evidence should not be granted, unless it is shown that proper diligence was used before the trial, and that the newly discovered evidence would probably have changed the result.—Shaw v. Besch, 107.

PRACTICE, CIVIL NEW—TRIALS, continued.

2. *Practice, civil—New trial—Evidence, weight of—Duty of trial court.*—It is the duty of the trial court, in passing upon motions for new trials, to weigh the evidence; it has opportunities to see the witnesses; to form opinions as to their veracity; to observe whether they are biased or prejudiced; and can also determine whether any improper influences operated on the jury in producing their verdict: and where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate to grant a new trial.—Reid v. Piedmont & Arlington Life Insurance Co., 421.

3. *Practice, civil—Motions—Bill of exceptions—Equitable defense—New trial, motion for.*—The motion to strike out an equitable defense and the action of the court thereon, being preserved by the bill of exceptions, there is no necessity for referring to it in a motion for a new trial.—Jones v. Manly, 559.

4. *New trial—Newly discovered evidence, when cumulative no ground.*—A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative.—State v. Sayers, 585.

PRACTICE, CIVIL—PARTIES; See Husband and Wife, 6, 7, 8; Judgment, 7; Practice, civil—Pleadings, 4.

PRACTICE, CIVIL—PLEADINGS.

1. *Practice, civil—Ejectment—Pleading—Judgment—Equity.*—In an action in ejectment, where defendant answered, alleging that the deed under which plaintiff held was void, having been made upon a sale under the powers of a deed of trust, without sufficient notice being given of the sale as required by the deed; and plaintiff replied to the answer simply denying the new matter and asking no additional relief, the court could do no more than set aside the deed. It had no power to go further and order the payment by the defendant of taxes and the trust debt, or to order a foreclosure and sale in a manner not provided in the deed of trust.—White v. Rush, 105.

2. *Practice, civil—Pleading—Suit on note—Failure to aver filing of note, or excuse for not filing—Motion in arrest will not lie, when.*—In a suit on a promissory note where defendant pleads to the merits, motion in arrest will not lie on the ground that the note was not filed with the petition, and that the petition neither alleged the filing or any statutory excuse for failure to file. For if the petition is in other regards sufficient, these averments are not necessary in order to constitute a cause of action. Such pleading is doubtless defective and demurrable. But it states a cause of action however defective; and the defect is cured by verdict. Burdsal v. Davis, 138.

3. *Practice, civil—Objections waived by answering over.*—By answering over, defendant waives any objections to the action of the court in striking out his previous answer. And this is true even when exceptions are saved at the time.—Ely v. Porter, 158.

4. *Note—Suit on—Descriptio personæ.*—A note was made payable to A. B. "president," and was secured by a mortgage wherein he was described as "president of the bank at Kirksville:" *Held*, that suit on the note was properly brought in the name of A. B. individually.—Id.

5. *Practice, civil—Pleading—Variance, when immaterial—Affidavit as to.*—In suit on a note, the petition alleged a promise to pay to "David A. Ely," while the note was made payable to "D. A. Ely." No affidavit was filed, (Wagn. Stat., 1033, § 1,) showing wherein defendant was misled. *Held*, that the variance was immaterial, and that having failed to make affidavit, he could not afterward complain.—Id.

6. *Practice, civil—Pleading—Wills, contests concerning—Petition, sufficiency of—Heirs not mentioned.*—A petition, which alleges that plaintiffs are the children of a decedent who left a will in which no mention is made of them, and prays for distribution according to law, is sufficient. The authority of the Circuit Court to order distribution in such cases attaches before any distribution of the estate, and consequently it is not necessary to allege in the petition that the legacies have been paid and the estate distributed. (Levins vs. Stevens, 7 Mo., 90, affirmed.)—Boyer v. Dively, 510

PRACTICE, CIVIL—PLEADINGS, continued.

7. Valle's Heirs v. Fleming's Heirs, 29 Mo., 152 and Shroyer v. Nickell, 55 Mo., 267 affirmed.—Jones v. Manly, 559.

See Administration, 6; Evidence, 1; Garnishment, 1; Husband and Wife, 6, 7; Justices' Courts, 4.

PRACTICE, CIVIL—TRIALS.

1. *Jury, additional instructions to.*—It is not error to give the jury additional instructions, when, after returning, they report their inability to agree.—Dowzelot v. Rawlings, 75.

2. *Practice, civil—Trials—Instructions—Questions law and fact must be distinguished.*—In framing declarations of law for the court sitting as a jury, questions of law and those of fact should be so separated that it may afterwards be seen by which class the general finding was controlled. They should generally conform to the rules established for instructions given to a jury.—Cape Girardeau Co. v. Harbison, 90.

3. *Continuance—Affidavit—Diligence.*—An affidavit for a continuance, on account of the absence of a material witness, must not only show the facts of his absence and materiality, but also that due diligence has been used to secure his testimony.—Wood v. St. L., K. C. & N. R. R. Co., 109.

4. *Instructions—Compliance with contract question of fact for the jury.*—In building contracts the question, whether the work was done as required by the contract, is one of fact for the jury. An instruction "that the plaintiff, by undertaking to do defendant a plain, substantial and workmanlike job, did not undertake to do a perfect one," is erroneous, for the reason that it took from the jury a question of fact which it was their province and not that of the court to determine. *Held*, further, that to do a thing in a plain, substantial and workmanlike manner, would imply that it should be perfectly done for the character of the job contemplated.—Smith v. Clark, 145.

5. *Practice, civil—Instructions, conflicting—Trial by court.*—Although an instruction given for one party may be erroneous, and may seem to be contradicted by one given for the other, yet when the case is tried by the court, and the two instructions together correctly declare the law, the error will not be ground for a reversal.—Cape Girardeau & Bloomington M. & G. R. R. Co. v. Renfroe, 265.

6. *Practice, civil—Trials—Instructions not applicable to facts as proved, improper.*—Instructions, which do not apply to the facts of the case, as shown by the testimony, are improper, even though they correctly declare abstract propositions of law.—Haskings v. St. L., K. C. & N. R. R. Co., 302.

7. *Practice, civil—Trials—Instructions, improper, not ground for reversal unless misleading.*—The giving of improper instructions is not alone sufficient ground for reversal, unless they have had the probable effect of misleading the jury.—Id.

8. *Practice, civil—Trials—Instructions.*—When all the propositions of law contained in an instruction offered by one party, which are applicable to the facts, have already been declared in instructions given for the opposite party, the refusal of such first mentioned instruction is not error.—Owens v. Hann. & St. Joe. R. R. Co., 386.

9 *Practice, civil—Trials—Verdict—Separate counts.*—When the petition sets up separate causes of action, stated in separate counts, with a separate demand for damages in each count, a general verdict for a general sum is improper and is good cause for arrest of judgment. This rule does not apply where there is but one cause of action, stated in different forms in different counts. In such a case a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for plaintiff would be sufficient.—Id.

10. *Insurance, life—Instructions—Evidence.*—An application for life insurance which was made a part of the policy, contained the following question: "Name and residence of your own or family physician, or of the medical attendant who last rendered you professional services?" This was answered,

PRACTICE, CIVIL—TRIALS, continued.

"Have none." An instruction was offered on the trial in a suit on this policy, declaring that "the plaintiff cannot recover, for the reason that deceased received medical attendance from a physician named, prior to the date of the application. *Held*, that the instruction was properly refused, because it undertook to tell the jury that they must find in a particular way, without regard to any testimony in the case but that of witnesses who supported the defendant's side.—Reid v. Peidmont & Arlington Life Ins. Co., 421.

11. *Practice, civil—Trials—Instructions, abstract, improper.*—Instructions, which do not respect the specific facts bearing on the particular case, are improper even though they correctly state abstract propositions of law.—Id.

12. *Practice, civil—Instructions.*—An instruction calculated to mislead the jury, or not based on evidence, is improper.—Royer v. Fleming, 438.

13. *Practice, civil—Trials—Railroads—Injury to stock—Double damages.*—In an action under section 43 of the railroad incorporation law (Wagn. Stat., 310–11) against a railroad, for injury to stock accruing from the failure of the railroad to erect and maintain suitable fences and cattle-guards, when the jury finds the actual damages, it is not error for the court to double them.—Hollyman v. Hann. & St. Joe. R. R. Co., 480.

14. *Practice, civil—Trials—Instructions commenting on evidence improper.*—Instructions, which comment on the evidence or direct attention to the improbability of a particular part of it, are improper. The improbabilities or contradictions in the statements of witnesses are matters for the consideration of the jury.—State v. Breeden, 507.

15. *Practice, civil—Witness—Matters to be inquired of in cross-examination.*—On cross-examination the witness may be inquired of as to all subjects pertinent to the case, whether touched upon in the examination in chief or not.—State v. Sayers, 585.

16. *Instructions should be based on evidence.*—Instructions not based on evidence ought not to be given.—Id.

17. *Evidence—Leading questions, admission of no ground for reversal.*—The admission of leading questions is a matter resting very much in the sound discretion of the trial court, and cannot furnish ground for reversal.—Wilbur v. Johnson, 600.

See Evidence.

PRACTICE, CRIMINAL.

1. *Ordinance—Disturbing the peace—Evidence—Defense.*—In a prosecution for disturbance of the peace, testimony, to the effect that the peace of certain individuals was not disturbed, may be admissible for the purpose of weakening the force of the prosecutor's testimony touching the offensive character of the noises; but not as showing a specific defense.—City of St. Charles v. Meyer, 86.

2. *Practice, criminal—Disturbing the peace—Evidence—Rebuttal.*—Testimony in chief having been concluded on both sides, the court committed no error in disallowing proof by the plaintiff that "the peace of individuals and the neighborhood was disturbed." Such proof would not be in rebuttal, but was necessary in the first instance to sustain the charge.—Id.

3. *Indictment—Altering "Dunklin County Patent," etc.*—An indictment charging defendant with feloniously altering a "Dunklin County Patent," but not describing the instrument, nor alleging wherein it was altered, held bad on motion to quash.—State v. Fisher, 256.

4. *Indictments—Selling "intoxicating liquors" on Sunday—Dram-shop keeper.*—Under the statute (Wagn. Stat., p. 553, § 22) an indictment charging that defendant sold "intoxicating liquors" on Sunday, but failing to aver that he was a dram-shop keeper," is bad.—State v. Lisles, 359.

5. *Practice, civil—Trials—Instructions commenting on evidence improper.*—Instructions, which comment on the evidence or direct attention to the improba-

PRACTICE, CRIMINAL, continued.
bility of a particular part of it, are improper. The improbabilities or contradictions in the statements of witnesses are matters for the consideration of the jury.—State v. Breeden, 507.

6. *Practice, criminal—Indictment—Capias, want of—Appearance.*—No capias is necessary for the arrest of a person indicted, if he appears in court, pleads not guilty, gives bond for his appearance, and petitions for a change of venue.—State v. Cook, 546.

7. *Practice, criminal—Verdict—Weight of evidence—Reversal.*—A verdict, even in a criminal case, will not be disturbed on account of want of evidence, unless there is a total absence of evidence, or it fails so completely to support the verdict, that the necessary inference is that the jury must have acted from prejudice or partiality.—Id.

8. *Practice, criminal—Indictment—Counts—Election.*—The defendant has no right upon a trial under an indictment containing several counts to compel the State to elect under which count she will proceed at the trial. (State vs. Porter, 26 Mo., 201.)—State v. Pitts, 556.

9. *Practice, criminal—County Court—Summoning regular panel of jurors.*—The act (Sess. Acts, 1873, p. 76) requiring the County Court to summon the regular panel of jurors thirty days before the term of the Circuit Court, is merely directory.—Id.

10. *Crimes—Effect—Animus.*—In criminal cases, the question is not as to the effect of the act done, but as to the *animus*.—Id.

11. *Crimes—Drunkenness.*—Drunkenness is no excuse for crime.—Id.

12. *Practice, criminal—Trials—Indictment—Counts—General finding.*—When an indictment contains several counts, all relating to the same transaction, and are framed on different sections of the statute to meet the exigencies of the trial, a general finding, which does not exceed in the punishment, which it assesses, the maximum of that assessed in any section on which any count is based, is permissible.—Id.

13. *Indictment—Robbery—Threats of violence, allegation as to.*—Under an indictment charging that a robbery was accomplished by means of threats to commit future violence, testimony, showing that the injuries were to be inflicted presently, is proper.—State v. Howerton, 581.

14. *Robbery, indictment for—Value not essential.*—In indictments for robbery, the verdict of the jury need not specify the value of the property taken.—Id.

15. *Practice, criminal—Witness, refusal of, to testify—Surprise—New trial.*—The refusal of a witness, placed upon the stand by the State, to testify, cannot operate as a surprise upon the defendant, such as to justify a new trial, when defendant could have used him at the trial on his own behalf.—Id.

16. *Practice, criminal—Continuance—Granting of, discretionary with court.*—The granting of a continuance is a matter resting very largely in the discretion of the trial court. And unless it be clearly shown that such discretion has been abused, the Supreme Court will not interfere.—State v. Sayers, 585.

17. *Venue—Change of, in criminal cases—Prejudice of judge.*—Under the act of 1873 (Sess. Acts 1873, p. 56), the granting of change of venue in criminal cases is discretionary with the court, although the application is based upon the prejudice of the judge. (State vs. O'Rourke, 55 Mo., 440.)—Id.

PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court—Witnesses—Capacity—Legal conclusions.*—The Supreme Court cannot review the finding of fact by the judge of the court below, upon personal inspection, as to the mental capacity of a witness. It may review, however, any legal conclusions declared to result from the fact of capacity or incapacity, as found.—State v. Scanlan, 204.

2. *Practice, civil—Bill of Exceptions—How amended—May be by Supreme Court.*—A bill of exceptions is, when duly filed, a part of the record, and may, where there is matter to amend by, be amended on motion, to the same extent and

PRACTICE, SUPREME COURT, continued.
subject to the same restrictions as any other portion of the record. And the Supreme Court will, on a proper showing, make such amendment without returning the bill to the lower court merely for that purpose.—Darrier v. Darrier, 222.

3. *Supreme Court—Equitable relief by.*—The Supreme Court may, at its pleasure, grant that relief that should have been accorded by the trial court.—Id.

4. *Supreme Court—Opinions in response to inquiries by governor—Not proper as to law already on the Statute Books.*—Under § 11, Art. VI, of the constitution, it is not proper for the Supreme Court to give an opinion, in response to the governor, as to the constitutionality of acts which are already upon the statute books. It is the province of the Supreme Court to give an opinion, or adjudicate upon such laws, only when the question of their validity is raised in some proceeding pending before them.—Answers to Governor, 369.

5. *Supreme Court—Opinion in response to Governor—Issue of commission not matter of control or interference by Supreme Court.*—In issuing a commission the governor acts in a political or executive capacity, and he alone can judge whether it should be exercised or not, and the courts can neither control nor interfere with him in the exercise of this right.—Id.

6. *Practice, civil—Appeals—Supreme Court will not weigh evidence.*—The Supreme Court, in law cases, will not weigh the evidence, and will not interfere with a verdict if there is any evidence to support it.—Reid v. Peidmont & Arlington Life Ins. Co., 421.

7. *Practice, criminal—Verdict—Weight of evidence—Reversal.*—A verdict, even in a criminal case, will not be disturbed on account of want of evidence, unless there is a total absence of evidence, or it fails so completely to support the verdict, that the necessary inference is that the jury must have acted from prejudice or partiality.—State v. Cook, 546.

8. *Practice, civil—Evidence, weight of.*—In a civil law case the Supreme Court will not decide upon weight of evidence.—Douglas v. Orr, 573.

9. *Practice, Supreme Court—Appeal—Order granting—Entry of, in bill of exceptions instead of record proper, how regarded.*—The transcript in a cause showed no order granting an appeal. But on *certiorari* the record thereupon brought up contained an entry in the bill of exceptions, that affidavit for appeal was made, and appeal granted. *Held*, that this entry should have appeared in the "record proper," but that the case should not be dismissed on account of such irregularity alone.—Id.

10. *Demurrer, judgment upon, will not support appeal.*—A judgment sustaining a demurrer is not such a final judgment as will support an appeal.—State ex rel. Howell Co. v. Justices Howell Co. Ct., 583.

See Judgment, 3, 8; Practice, civil-New Trials, 3; Practice, civil-Trials, 17.

PRESUMPTION.

1. *Evidence—Presumption of continuance of a state of facts once proved to exist.*—Evidence of the existence of a state of facts at a certain time raises a presumption that such facts exist for a reasonable time thereafter.—Haskings v. St. L., K. C. & N. R. R. Co., 302.

See Estoppel, 1; Judgment, 5; Limitations, 3, 4, 5; Res adjudicata, 4, 5; Wills, 15.

PROCESS.

1. *Clerk of Court—Issue of process in his own behalf.*—A clerk of a court of record may issue process in his own behalf as plaintiff.—Huff v. Shephard, 242.

2. *Practice, civil—Summons—Service of, in wrong county—Amendment of petition.*—If a summons be served on a defendant in the wrong county, the defect cannot be remedied by filing an amended petition which, if originally filed, would have authorized the service as made.—Id.

PUBLIC USE; See Forest Park.

R.

RAILROADS.

1. *Railroads—Fences—Killing of stock—Damages—Timber land.*—The 43rd sec. of the Railroad Corporation Law, (Wagn. Stat., 310–11) which requires all railroads "to erect and maintain fences on the sides of the road where the same passes through, along or adjoining, inclosed or cultivated fields or unin-closed prairie lands," requires that in such places fences shall be erected and maintained on both sides of the road. But the obligation is not extended to timber lands, or land from which the timber has been cut but which is not cultivated. And when stock is killed at such a place the owner is not entitled to double damages. He can only recover single damages, by proceeding under sec. 5 of the Damages Act. (Wagn. Stat., 520.)—Tiarks v. St. L. & I. M. R. R. Co., 45.

2. *Damages—Action before a justice for killing stock and injuries to harness—Jurisdiction as to amount.*—Where suit is brought before a justice of the peace against a railroad company combining a claim for killing a horse with a claim for injuries to the harness, it must be instituted under sub-division 3, of § 3, Art. I, of the act touching justices of the peace (Wagn. Stat., 808–9,), and judgment for the combined injuries must be limited to fifty dollars. Such suit cannot be brought under sub-division 5 for killing the horse, and in the same suit also under sub-division 3 for damages to the harness.—Dillard v. St. L., K. C. & N. R. Co., 69.

3. *Damages—Stock killed at railroad depot—Killed at switch—Negligence—Proof.*—Where stock is killed on the grounds of a railroad at a depot, and it is necessary for transaction of business that the space shall be kept open, the company will not be liable without proof of negligence, notwithstanding the fact that the road is not fenced at that point. But where stock is killed on a railroad switch at a point where it is unnecessary to keep the road open in order to transact business, the company will be liable without proof of negligence.—Morris v. St. L., K. C. & N. R. R. Co., 78.

4. *Damages—Property owned by minor son—Father cannot recover for.*—A father cannot recover damages from a railroad company for killing stock owned by his son, although the latter is a minor.—Id.

5. *Damages—Railroad—Killing of stock—Practice—Verdict.*—In proceedings against a railroad for double damages for the killing of stock under § 43, Wagn. Stat., 310, the proper practice is for the jury to find a verdict for single damages only, and the court may then render judgment for double damages.—Wood v. St. L., K. C. & N. R. R. Co., 109.

6. *Railroads—Killing stock—Single and double damages.*—An action for damages for killing of stock cannot be brought under both the forty-third section of the Railroad Law, (Wagn. Stat., 310,) and the fifth section of the Damage Act, (Wagn. Stat., 520). Such action must be brought under only one of them, and should be tried under the one which applies to the facts of the case as made by the petition and evidence; and instructions which leave it uncertain under which act they are to proceed in estimating damages, tend to confuse and mislead the jury, and are improper.—Id.

7. *Railroads—Damages—Killing of bull—Const. Stat.*—In suit against a railroad for the killing of stock, it is no defense that the animal was a bull and subject to the provisions of § 5 of the act passed for the restraint of certain animals therein named (Wagn. Stat., p. 134.).—Schwarz v. H. & St. Joe R. R. Co., 207.

8. *Railroads—Damages—Killing of stock—Negligence—Bells, etc.—Contributory negligence.*—Under the statute of this State, (Wagn. Stat., 310, § 38) the failure, by the person in charge of a railroad train, to ring the engine bell or blow the whistle at a distance of at least 80 rods before reaching the crossing of a public highway, is negligence, and if, under such circumstances, cattle are killed at such crossing, such negligence is sufficient of itself to create a liability on the part of the railroad company, unless some contributory negligence can be shown on the part of the owner of the cattle.—Owens v. H. & St. Joe R. R. Co., 386.

RAILROADS, continued.

9. *Railroads—Damages—Killing of stock—Bull suffered to run at large.*—Under the statute concerning animals running at large (Wagn. Stat., 134, § 5) it is not unlawful for bulls to run at large until after notice has been given to the owner, and even then the only remedy would be the one prescribed by the statute; and under this view the fact, that a bull was so permitted to run at large, would be no defense to an action by his owner for his killing by a railroad train. (Schwarz vs. Hann. & St. Joe. R. R. Co., *ante*, p. 207, affirmed.—Id.

10. *Damages—Railroads—Killing of stock—Efforts necessary to safety of passengers.*—Necessary efforts made by the agents of a railroad, after the discovery of cattle on the track, to save the train and passengers from threatened danger, would not render the railroad company liable even though they might result in injury to the cattle.—Id.

11. *Practice, civil—Trials—Railroads—Injury to stock—Double damages.*—In an action under section 43 of the railroad corporation law (Wagn. Stat., 310-11) against a railroad, for injury to stock, accruing from the failure of the railroad to erect and maintain suitable fences and cattle-guards, when the jury find the actual damages, it is not error for the court to double them.—Hollyman v. H. & St. J. R. R. Co., 480.

12. *Railroads—Killing of stock—Negligence.*—Although failure of the persons in charge of a railroad train to ring a bell or blow a whistle when within eighty rods of a public crossing is negligence, yet, such negligence is not, by itself, sufficient to authorize a recovery for damages for an animal killed at such place, unless it is shown by sufficient testimony, that such killing was attributable to such negligence.—Stoneman v. A. & P. R. R. Co., 503.

See Condemnation of Land, 2, 3, 4, 5, 6; Revenue, 4, 5.

RECORD; See Administration, 11; Conveyances, 4, 6, 7; Guardian and Ward, 7; Land and Land Titles, 2; Mortgages and Deeds of Trust, 15, 23; Practice, Supreme Court, 2.

REGISTRATION; See Record.

RELEASE; See Security, 1, 2.

RENTS; See Sales, 1.

REPLEVIN.

1. *Replevin—Property in bulk—Separation of—In what cases action will lie.*—Generally where property cannot be identified or separated so as to be seized in kind, replevin will not lie. But where goods mixed are of the same nature and value, although not capable of an actual separation by identifying each particle yet if a division can be made of equal value, as in the case of oats, corn or wheat, either party may claim his aliquot part by this action.—Kaufman v. Schilling, 218.

RES ADJUDICATA.

1. *Trespass for seizing plaintiff's land—Dedication—Res adjudicata.*—Plaintiff sued a municipality in trespass for plowing, scraping and digging ditches upon his land, and claimed that the same was worth a thousand dollars, and that he was injured to that amount. Defendant pleaded a dedication of the land to public use. Judgment was rendered in favor of plaintiff for eighty dollars, and the judgment was satisfied. In subsequent suit by plaintiff against the corporation for trespass in afterward seizing the same land, *held*, that the former judgment was conclusive against defendant as to the dedication; but that plaintiff might introduce the record of the former suit, and also parol evidence, to show that the title and value of the property was not adjudicated in that suit.—Hickerson v. City of Mexico, 61.

2. *Res adjudicata—Former finding—Parol evidence as to.*—Parol evidence is proper in order to show whether a question was determined in a former suit, where the record is not conclusive on that point. The record may be first introduced, and it may then be followed by such parol evidence as may be necessary to give it effect, or show on what issues it was grounded.

Where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues.—Id.

RES ADJUDICATA, continued.

3. *Res adjudicata—Evidence aliunde as to, may be introduced, when.*—In order to show by evidence *aliunde* that a matter is *res adjudicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination.—Id.

4. *Res adjudicata—Presumptions as to.*—Although it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit.—Id.

5. *Res adjudicata—Presumptions as to proof.*—Where matters could have been proved in a former action, the presumption is that such was the fact; but this presumption may be rebutted.—Id.

6. *Mortgage, suit on—Prior encumbrancer made party defendant—How far concluded thereby from suit on first mortgage—Res adjudicata—R. C.* 1855—*Construed statutes.*—In suit brought to foreclose a mortgage while the statute of 1855 in relation to mortgages was in operation (See § 7) plaintiff had a prior encumbrancer made one of the parties defendant. But the petition did not ask that plaintiff might have the privilege of paying off his claim and be subrogated to his rights, nor that said claim should be first satisfied in order that a clear title might be obtained upon a sale. Upon these matters the judgment was also silent. *Held*, that such suit did not constitute a bar to further proceedings by the first encumbrancer on his mortgage. Although technically made a party, his rights were unaffected.—Dunn v. Raley, 134.

7. *Practice, civil—Res adjudicata—Subsequent proceedings—Laches.*—Where a party to an action, being fully apprised of his rights, suffers judgment to go against him, when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery of the amount claimed, either in whole or in part, he cannot, in a subsequent proceeding, at law or in equity, be allowed to re-agitate questions which were, or should have been, adjudicated at the former trial.—Shelbina Hotel Ass'n v. Parker, 327.

REVENUE.

1. *Revenue—Stock in National Bank liable to taxation.*—Shares in National Banks are liable to assessment and taxation in this State. (Lionberger vs. Rowse, 43 Mo., 67: First Nat. Bank vs. Meredith, 44 Mo., 500, affirmed.)—Curtis v. Ward, 295.

2. *Revenue—Personal property of non-residents.*—Personal property of non-residents which is found within the local jurisdiction is taxable here, regardless of whose hands it happens to be in.—Id.

3. *Revenue—Board of equalization of railroad property.*—Its duties defined.—Washington Co. v. St. L. & I. M. R. R. Co., 372.

4. *Revenue—Board of equalization—Railroads—Assessment in counties—Pleading.*—Although it may appear from an allegation in the petition, that the board of equalization assessed the actual value of the railroad property in Washington county, instead of a share in the aggregate valuation proportional to the number of miles of road within the county, as required by law, yet if from the general tenor of the petition it appears that the sum assessed was ascertained by the methods which the law prescribes, the pleading will be held sufficient.—Id.

5. *Revenue—Board of equalization—Railroads—Assessment—Evidence—State auditor's certificate—Records of board.*—In a suit by the county to recover the amount of taxes assessed by the board of equalization against a railroad corporation, the State auditor's certificate to the County Court is not competent evidence to prove the action of the board. The record of its proceedings, which the board is required by law to keep, or its exemplification, is the best and only proper evidence for that purpose, when attainable.—Id.

6. *Revenue—Board of equalization—Assessment without evidence.*—An assessment of valuations made by the board of equalization, without any evidence before it, would be invalid.—Id.

REVENUE, continued.

7. *Revenue—Auditor's certificate imperfect—Levy of tax—Action of board.*—While the auditor's certificate might be so imperfect as to justify the County Court in refusing to levy the tax, yet if it appears that the court, deeming the authority sufficient, has made the levy, this will not be disturbed if it also appear from other testimony that the action of the board was such as to authorize the levy.—Id.

REVIEW, PETITION FOR; See Practice, civil—Appeal, 1.

ROADS, COUNTY; See Mandamus, 1.

S.

ST. LOUIS, CITY OF.

1. *St. Louis, city of—Bawdy houses—Amendment to charter—Repealing act, March 30, 1874, did not revive general statute.*—The amendment to the city charter of St. Louis, approved March 4, 1870, authorizing the corporation to "regulate or suppress" bawdy houses, operated as a repeal within the city limits of the general law which prohibits the keeping of such houses. (State vs. Clark, 54 Mo., 33 affirmed.) The amendment of March 30, 1874, which repealed the former amendment, did not thereby revive the general statute in the city of St. Louis.—State v. DeBar, 395.

2. *Special act will prevail over inconsistent general law.*—If a special provision, applicable to a particular object or locality, be inconsistent with a general law, the former must prevail. And this rule applies to a comparison of duly authorized municipal ordinances with State statutes; since both are from a common source of authority.—Id.

3. *St. Louis, city of—Charter—Limitation, that ordinances shall not be inconsisten with general law, yields to special provision.*—The charter limitation upon the power to pass ordinances, that they shall be "not inconsistent with any law of the State," being general, must yield to the special and particular provision which authorizes the regulation of bawdy houses, in contravention of the State law.—Id.

4. *Statute, construction of—Repeal by implication—Doctrine, applications of.*—While it is true that repeals by implication should not be favored, yet the proper application of this doctrine appears where the effort is to annul a special provision by implication of a general law.—Id.

5. *St. Louis, city of—Charter—Power to suppress bawdy houses.*—The city corporation of St. Louis has full power, under its amended charter, to suppress bawdy houses.—Id.

SALES; See Contracts, 1, 2; Mortgages and Deeds of Trust; Sales, Judicial.

SALES, JUDICIAL; See Administration, 10, 11; Guardian and Ward, 3, 4, 5, 6, 7, 8; Justices' Courts, 6.

SEPARATION; See Dower, 5.

SCHOOLS AND SCHOOL LANDS.

1. *Schools—District—Organization—Evidence.*—The fact that a school district has in fact been organized and conducting business for a period of thirteen years is sufficient to show a legal existence without resort to record evidence of their organization; particularly where the question involved is the disposition of funds collected under acts officially performed by the directors of such district.—Rice v. McClelland, 116.

2. *Schools—Township Board—Irregularities.*—Proceedings of township boards of education will not be treated as void and set aside in collateral proceedings for mere irregularities which do not affect the substantial rights of the parties. Their actions will be upheld when good faith has been exercised, unless in very glaring cases of wrong, or when direct proceedings are instituted at the time to set their action aside.—Id

SCHOOLS AND SCHOOL LANDS, continued.

3. *Schools—Taxes—Sub-districts, division of—Distribution of funds.*—A tax was assessed and levied by the directors of a certain school district numbered 3 for the erection of a school house. Before the tax was collected and paid over, the district was sub-divided, and a new district created out of a part which was designated as No. 5. A controversy arose as to the disposal of said taxes. *Held*, that under § 99, of the School Law, (Wagn. Stat., 1261) the money could be paid out only for the purpose for which it was levied and collected, and the township board had no right to apportion money collected for the erection of a school house in one sub-district between the two new districts. Any apparent injustice in such exclusive application to a part of the original district of the funds arising from taxation of the whole could be remedied under the provision of § 25 of the same act.—Id.

4. *Schools, sub-district—Formation of, what illegal—Action by teacher for services.*—Under the statute (Wagn. Stat., p. 1245, § 17) a school sub-district cannot be lawfully formed out of territory situated in two townships, without a joint meeting of the township boards of education. The fact that one board held such meeting, and that the individuals constituting the other board signed a paper purporting to relinquish the territory in their township, would not render the formation of the sub-district valid. And no action will lie for services as teacher under a contract made with the local directors of such sub-district.—Smith v. Township Board, etc., 297.

See Courts, County, 1, 3.

SEALS; See Mortgages and Deeds of Trust, 11, 13, 15.

SECURITY.

1. *Security, verbal release of—Proof as to intention.*—Proof of intention to give a verbal release of a written security, to avail, must be clear and satisfactory.—Lippold v. Held, 213.

2. *Mortgage—Taking of new note, effect of, as to release.*—Where a note is secured by a mortgage, the taking of a new note does not of itself operate as a discharge of the lien. Nothing short of an actual payment of the debt itself, or an express release, will have that effect.—Id.

SEDUCTION; See Breach of Promise, 2.

SERVICE; See Process, 2.

SHERIFF; See Levy, 1.

SOUTHERN ARMY; See Mortgages and Deeds of Trust, 24.

SPECIFIC PERFORMANCE; See Equity, 1, 2, 3.

STATUTES, CONSTRUCTION OF.

1. *Construction of statute—Re-enactment by reference—Constitution.*—An act, declaring that a previous act "is hereby amended so as to authorize the city marshal to act as deputy constable, etc." is in conflict with Art. IV, subd. 25, of the State Constitution, as re-enacting a law by mere reference. (See Mayor, etc., vs. Trigg, 46 Mo., 288.)—French v. Woodward, 66.

2. *Constitution—Extension of city limits—Legislative power—Taxation*—An act of the legislature enlarging the limits of a municipality, and thereby bringing within its area and subjecting to municipal taxes, against the owner's consent, farm property lying outside the actual city limits, is not, by reason of such facts, unconstitutional. Such act is a proper exercise of legislative power and discretion.—Giboney v. Cape Girardeau, 141.

See St. Louis, City of, 2, 3, 4.

See Administration, 8, (Wagn. Stat., 1372–3, § 1;) 9, (Wagn. Stat., 85, §§ 7, 8, 10, 11).

Arbitration and Award, (Wagn. Stat., 145).

Bills and Notes, 8, (Wagn. Stat., 1302, *et seq.*; *Id.*, 1010, § 20;) 11, (Wagn. Stat., 1274, § 2).

Condemnation of Land, 2 (Wagn. Stat., 326).

Court, Adair County Probate, (Sess. Acts, Feb. 11, 1847, § 3).

STATUTES, CONSTRUCTION OF, continued.
COURT, COUNTY, 5 (Wagn. Stat., 403, § 4).
DOWER, 1, 2, (Wagn. Stat., 539-40, §§ 5, 8, 9, 10).
DRAM-SHOP, 2, (Wagn. Stat., 552, § 20).
EJECTMENT, 5, (Wagn. Stat., 560, § 13).
EVIDENCE, 6, (Wagn. Stat., 1373-4, §§ 3, 7, 9;) 8, (Wagn Stat., 596, § 40;) 19, (Wagn. Stat., 1372-3, § 1;) 20, (Wagn. Stat., 85, §§ 7, 8, 10, 11).
FOREST PARK, 3, 6, 7, (Sess. Acts, 1874, p. 371-4).
GUARDIAN AND WARD, 1, (Sess. Acts, 1847, Feb. 11, § 3;) 3, (R. C. 1855, 826-7, §§ 25, 26, 27;) 5, (R. C. 1845, 867. §§ 24, 25, 26).
HANNIBAL COURT OF COMMON PLEAS, (Wagn. Stat., 1005, § 1).
HUSBAND AND WIFE, 7, (Wagn. Stat., 1015, § 10).
JUSTICES' COURTS, 1, (Wagn. Stat., 808-9, § 3).
LAND AND LAND TITLES, 2, (Sess. Acts, Feb. 2. 1847;) 3, (Wagn. Stat., 596, § 40),
MORTGAGES AND DEEDS OF TRUST, 11, (R. C. 1855, 1089, § 7).
PRACTICE, CIVIL—PLEADINGS, 5, (Wagn. Stat., 1033, § 1).
PRACTICE, CIVIL—TRIALS, 13, (Wagn. Stat., 310-11, § 43).
PRACTICE, CRIMINAL, 4, (Wagn. Stat., 553, § 22;) 9, (Sess. Acts, 1873, p. 76;) 17, (Sess. Acts, 1873, p. 56).
RAILROADS, 1, 5, 6, 11, (Wagn. Stat., 310, § 43;) 1, 6, (Wagn. Stat., 520, § 5;) 2, (Wagn. Stat., 808-9, § 3;) 7, 9, (Wagn. Stat., 134, § 5;) 8, (Wagn. Stat., 310, § 38),
RES ADJUDICATA, 6, (R. C. 1855, p. 1089, § 7).
ST. LOUIS, CITY OF, (Sess. Acts, 1870, p. 464; Sess Acts, 1874, p. 364, §10).
SCHOOLS AND SCHOOL LANDS, 3, (Wagn. Stat., 1247, § 25; *Id.*, 1261, § 99;) 4, (Wagn. Stat., 1245, § 17).
SURETY, 2,(Wagn. Stat., 1010, § 20; *Id.*, 1302, *et seq*).
WILLS, 14, (Wagn. Stat., 1041, § 13).

STOCK, KILLING OF; See Justices' Courts, 1; Railroads.

SUNDAY; See Practice, criminal, 4.

SURETY; See Bills and Notes, 5, 8, 9, 10; Dram-Shops, 1, 2.

SWAMP LANDS.

1. *Swamp lands—Act Sept. 28, 1850, effect of—Neglect of officers.*—The act of Congress of Sept. 28, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, constituted a present grant vesting an absolute title in the State of Missouri to such lands, without issue of patent; (H. & St. J. R. R. vs. Smith, 41 Mo., 310; S. C., 9 Wall., 95; Clarkson vs. Buchanan, 53 Mo., 563,) and after the act took effect the power of disposal in the general government was gone. If its officers, by inadvertence, again sold and conveyed the land, the purchaser under them would take no title, because the government had no title to convey—Campbell v. Wortman, 258.

T.

TAXES; See Schools and School Lands, 3; Statute, construction of, 2.

TRESPASS; See Husband and Wife, 8; Res Adjudicata, 1.

TRUSTS AND TRUSTEES.

1. *Assignments—Inventories—Conveyances—Trusts.*—Where A., as assignee, took possession of an interest in property which had passed to him by the assignment, and without having the property inventoried and appraised, or procuring an order of court for its sale, sold the same for $100, and then, in two or three days thereafter, re-purchased it from his vendee by quit-claim, for the expressed consideration of $400, and then procured the whole title from the person who owned the other interest, claiming it all as his own, and did not account for the proceeds of the sale on his settlement; *Held*, that the transaction was fraudulent *per se*, and that the assignee would be declared a trustee for the assignor or whoever was entitled to his interest.—Ownby v. Ely, 475.

See Corporations, 2; Courts, County, 1; Ejectment, 1; Mortgages and Deeds of Trust; Wills, 3, 4, 12.

V.

VARIANCE; See Practice, civil—Pleadings, 5

VENDOR'S LIEN; See Mortgages and Deeds of Trust, 14.

VENUE, CHANGE OF.

1. *Venue, change of—Attorneys are competent witnesses to prove facts necessary to sustain.*—Attorneys at law are competent witnesses to sustain allegations in support of an application for change of venue.—State v. Lack, 501.
   See Practice, criminal, 6.

VERDICT; See Practice, civil—Trials; Practice, criminal, 7.

W.

WAIVER; See Composition, 1; Practice, civil—Appeal, 2.

WAR; See Mortgages and Deeds of Trust, 24.

WASTE; See Ejectment, 5.

WILLS.

1. *Wills—Estate for life with power to devise—Does not convey absolute ownership.*—The devise of an estate for life, with authority in the devisee to dispose of the same by last will, does not convey absolute ownership. The right of testamentary disposition is a mere power.—Bryant Adm'r, v. Christian Adm'r, 98.
2. *Wills—Estate for life—Power to devise—Will construed.*—A testator bequeathed all his property to his widow, during her natural life, to manage, dispose of and enjoy, free from all incumbrance, without giving security as executrix or making annual settlements during her widowhood, and with power to dispose of one-half the estate by last will. In the event of her second marriage, the estate was to be regularly administered upon, so that the widow should be secure in the "income and emoluments of the estate during her life." *Held,* that the manifest intention of the testator was to devise a life estate only, with the usufruct and a testamentary power as to one-half.—Id.
3. *Will—Fund left in trust to wife and children—Land purchased with—Title of wife in.*—A will directed the executor to secure a certain fund "for the benefit of Jane Allen and her children, and not to be subject to the control of her present husband." The fund was afterward invested by trustee in certain lands which were conveyed by him to "said Jane Allen and her children to their only proper use, benefit and behoof forever, etc." *Held,* that under the will, Mrs. Allen had no power to dispose of the property, and hence took no absolute and exclusive title to the land, but merely an estate in common with her children; and that she could convey nothing more than her undivided share.—Allen v. Claybrook, 124.
4. *Wills—Children described in as a class, etc.*—Where in a will, children are designated as a class, without further description, the general rule is that it will include all who answer the description at the time the will took effect.—Id.
5. *Wills—Devises in fee tail—Cross remainders—Statute of 1825—Farrar vs. Christy.*—A will contained the following bequest: "I give and bequeath to my daughter Harriet the north half of my tract of land in "A.," and the south half thereof to my daughter Juliet, and in the event of the death of Harriet or Juliet without issue, the part devised to the one deceased to descend to the survivor; and in the event of the death of both without issue, the said parcels of land shall descend to the heirs of my daughter Mary and my daughter Clarissa, to be equally divided among them when they become of age." Juliet died after the death of testator, leaving a son who survived her but a short time, and his father became then the sole surviving representative of said son. Harriet subsequently died without issue. *Held,* that notwithstanding the manifest intent of the testator to keep the estate in the blood, under the statute touching descents and distributions it passed to the surviving husband of Juliet.

WILLS, continued.

By the will Juliet was immediately vested with a fee simple title to Harriet's estate, subject to be divested by the birth of children to Harriet, and the latter was in like manner and subject to the same conditions vested with a fee simple in the estate of Juliet. As Juliet had a son who survived her, Harriet's interest in the estate of Juliet ceased. But as Harriet died childless, the fee simple of Juliet in her estate was never divested. Hence, on Harriet's death it passed to the heirs of Juliet and not to the heirs of Harriet. (Farrar vs. Christy, 24 Mo., 453.)—Harbison v. Swan, 147.

6. *Wills, contest concerning—Burden of proof—Right to open and close case.*—When the validity of a will is contested, and the defendants are endeavoring to establish a hold under the will, they have the affirmation of the issue to be tried, and the burden of proof remains with them throughout the trial.—They are thereupon entitled to the opening and conclusion.—Benoist v. Murrin, 307.

7. *Wills—Disposing mind and memory defined.*—A disposing mind and memory may be said to be one which is capable of presenting to the testator all of his property and all the persons who come reasonably within the range of his bounty; and if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will.—Id.

8. *Wills—Capacity of testator—Insanity.*—Whenever a person imagines something extravagant to exist which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delirium relates to his property, he is then incapable of making a will. But to invalidate the instrument it must be directly produced by the partial insanity or monomania under which the testator was laboring.—Id.

9. *Wills—Contests touching—Province of jury—Instructions.*—In contests touching a will, it is the province of the jury to determine simply whether or not the will is a valid instrument. It is not one of their functions to make an equal distribution of the property or determine whether ample provision had been made for all persons reasonably to be presumed to come within the range of the testator's bounty, and instructions which direct their attention to such questions are erroneous.—Id.

10. *Wills—Construction—Life estate.*—A will which provided for the conveyance to the testator's widow, of such part of his estate as should remain after the payment of his debts, "to be used and appropriated by her in and about her maintenance and support, with power to her to dispose of one-fourth of the same remaining at the time of her death as to her should seem fit, and that the residue of what should so remain should, at the time of her death, pass to and be vested in the children of testator's deceased brother," conveyed to the widow only a life interest in the property, with a power to dispose of one fourth of the property remaining after her support at the time of her death (Carr vs. Dings, 54 Mo., 95 cited and affirmed.)—Carr v. Dings, 400.

11. *Wills—Construction of—Intention must govern—Term "residue."*—In construing wills the intention of the testator is the object to be attained, and, in order to ascertain this, it frequently becomes necessary to look at the whole will, and to qualify particular clauses, so as to make them harmonize with the general intention. And when a doubt arises as to the extent of the application of the word "residue," as used in a will, whether it was intended to apply to the whole of the residue of the estate, or be confined to a particular part, courts generally incline to extend it to the whole, where there is no other residuary claim.—Id.

12. *Conveyances—Wills—Life estate—Power of disposition—Case stated—Estate conveyed.*—It is generally true that an absolute power of disposition over property conferred by will, and not controlled by any provision or limitation, amounts to an absolute gift of the property; but where a life estate only is expressly given, the rule is otherwise. (Rubey vs. Burnett, 12 Mo., 1; Gregory vs. Cowgill, 19 Mo., 415.) A deed conveyed property to a trustee for the special use and benefit of the grantor's wife and her children, and the *habendum* clause expressed the conveyance to be for the special use and benefit of the

WILLS, continued.
wife during her natural life, or her widowhood, and after her death for the special use of her children. The deed also gave the trustee power at, the special instance and request of the wife, to sell or dispose of all of said property and apply the proceeds to the special use of the wife and children, "but specially limited to her natural life and widowhood," as aforesaid: *Held*, that the interest of the wife was limited to the use and benefit of the property during her natural life and widowhood, and that the children were invested with a title to the remainder by operation of the conveyance and not as the representatives of the wife.—Wommack v. Whitmore, 448.

13. *Practice, civil—Pleading—Wills, contests concerning—Petition, sufficiency of—Heirs not mentioned.*—A petition, which alleges that plaintiffs are the children of a decedent who left a will, in which no mention is made of them, and prays for distribution according to law, is sufficient. The authority of the Circuit Court to order distribution in such cases attaches before any distribution of the estate, and consequently it is not necessary to allege in the petition that the legacies have been paid and the estate distributed. (Levins v. Stevens, 7 Mo., 90, affirmed.)—Boyer v. Dively, 510.

14. *Wills, contests concerning—Issues may be framed and submitted to the jury.*—Under our statute (Wagn. Stat., 1041, § 13) in contests concerning the construction or validity of wills, the court may frame issues and take the opinion of a jury upon any specific questions of fact involved, although such verdicts are not binding upon the court.—Id.

15. *Wills, contests concerning—Instructions—Legitimacy—Death of parents and offspring—Presumption.*—Where the parents and their offspring are all dead, the presumption is in favor of the legitimacy of the offspring; and in contests concerning wills where the question arises, it is proper to instruct the jury to that effect.—Id.

WITNESSES.

1. *Practice, Supreme Court—Witnesses—Capacity—Legal conclusions.*—The Supreme Court cannot review the finding of fact by the judge of the court below, upon personal inspection, as to the mental capacity of a witness. It may review, however, any legal conclusions declared to result from the fact of capacity or incapacity, as found—State v. Scanlan, 204.

2. *Witness—Competency—Extreme youth—Tests.*—The only test of competency in a child under ten years of age to be a witness, is whether it appears incapable of receiving just impressions of the facts, or of relating them truly.—Id.

3. *Witness—Capacity—Extreme youth—Reception of evidence.*—Where a child, called upon to testify, is manifestly embarrassed by the novelty of the surroundings, so as to give, at first, absurd or unintelligible answers, it is eminently proper for the court to wait for a recovery of the mental equilibrium before putting further questions and deciding upon the capacity of the witness.—Id.

4. *Husband and wife—Conveyance secured by wife from husband's funds—Advancement.*—A conveyance of land, which a wife secures to herself in her own name with her husband's funds, will be presumed to be an advancement for her benefit. But whether such be the fact is a question of intention, and evidence on that point is admissible especially where the husband denies such intention. And *semble*, that fraud, in any form, in obtaining the title against his consent, will itself rebut the presumption.—Darrier v. Darrier, 222.

5. *Husband and wife—Competent witnesses, where opposing parties—Agency of wife.*—In suit by the husband against the wife, to divest the latter of title to land, the parties are competent witnesses against each other in regard to communications between them. And the agency of the wife having been satisfactorily established, the same rules of evidence will prevail as between any other principal and agent.—Id.

6. *Husband and wife, confidential communications between.*—A letter from a husband to his wife, directing her to purchase certain land for him, may be introduced in evidence, and does not fall within the rule which forbids the disclosure of confidential communications.—Id.

WILLS, continued.

7. *Practice, civil—Witnesses—Married woman.*—The marriage of a plaintiff, pending her suit, will not render a woman incompetent as a witness.—Charles v. St. L. & I. M. R. R. Co., 458.

8. *Witnesses—Impeachment—Moral character may be inquired into.*—In order to discredit a witness, the inquiry need not be confined to his veracity alone, but may properly be extended to his general moral character.—State v. Breeden, 507.

9. *Witnesses—Credibility—Conspiracy—Motives.*—The spirit, which animates a witness, is always a proper subject for inquiry, in order that the jury may place a proper estimate upon the value and importance of his testimony. And the formation of a conspiracy against a party, on the part of witnesses, may be properly shown on the examination.—Id.

See Evidence; Venue, change of.